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Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, ET AL.,
PETITIONERS,

vs.

SOUTHERN RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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ARROW TRANSPORTATION COMPANY, ET AL.,
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[fol. A]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

Arrow Transportation Company, a corporation, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., a corporation, City of Guntersville, Alabama, a municipal corporation,

vs.

Southern Railway Company, a corporation, Louisville & Nashville Railroad Company, a corporation, St. Louis-San Francisco Railway Company, a corporation, Seaboard Airline Railroad Company, a corporation.

Basis of Action: Suit to temporarily restrain and enjoin defendants from applying to rail transportation of certain grain certain railroad tariff schedules which are currently under investigation by the I.C.C. (Docket No. I & S 7656) until the Commission can rule on their lawfulness, etc.

For Plaintiff:

Morris K. Sirote, Sirote, Permutt, Friend & Friedman, John C. Lovett, Lovett & Lovett, Benton, Kentucky for all plaintiffs except City of Guntersville; Joe Starnes, Jr., Guntersville, Ala. for City of Guntersville.

For Defendant:

Cabaniss & Johnston for Southern Rwy. Co.; also for Sou. Rwy. Co., William D. McLean, James L. Tapley and William P. Stallsmith, Jr., 15th & K Streets, N.W., Wash. 13, D.C.; Cabaniss & Johnston for St. Louis-San Francisco Rwy. Co. and SAL Rwy. Co.; James A. Simpson for L. & N. R.R. Co.

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED
1962			
July 30	Ck-Sirote, Permutt, Friend & Friedman	15 00	
July 31	Cr 102411		15 00
Aug 2	Cash-John C. Lovett	5 00	

[fol. B]

DOCKET ENTRIES

DATE	
1962	
July 27	Complaint filed—Page 1
Aug. 1	Motion of plaintiffs for preliminary injunction filed—Page 2
Aug. 1	Summons and complaint, with copy of motion for preliminary injunction attached, issued with copy for service on the Louisville & Nashville R.R. Company—del. to Marshal for service (Plaintiff's attorneys advise that all other defendants have accepted service)
Aug. 1	Hearing before the Hon. C. W. Allgood on plaintiffs' motion for preliminary injunction—Affidavit of Howard G. King, supplemental affidavit of Howard G. King, affidavit of O. J. Walls, affidavit of John D. Bagwell, Jr., affidavit of Dr. T. E. Martin, affidavit of John McWilliams on behalf of plaintiffs filed—Brief of T.V.A. as amicus curiae in support of motion for preliminary injunction—Affidavits of Robert S. Hamilton (2), James L. Tapley, Dewey L. Melton, W. Herman Clark and Sam H. Flint on behalf of defendants filed—hearing continued to Aug. 2, 1962 at 2:00 P.M.—Pages 18, 23, 31, 34, 36, 39, 43, 45, 49, 53, 55, 57, 60
Aug. 1	Motion of defendant, Southern Railway Company, to dismiss filed—Page 65
Aug. 1	Answer of defendant, Southern Railway Company filed—Page 67

DATE	
1962	
Aug. 2	Hearing resumed—Memorandum opinion of the Hon. C. W. Allgood denying plaintiff's motion for preliminary injunction for lack of jurisdiction, and denying defendant's motion to dismiss filed and entered—copies del. to attorneys
Aug. 2	Summons and complaint, with motion for preliminary injunction attached, returned, executed on L. & N. R.R. on Aug. 1, 1962 and filed—Page 73
Aug. 3	Findings of Fact, Conclusions of Law, and Judgment denying plaintiff's motion for preliminary injunction, for lack of jurisdiction, and overruling defendant's motion to dismiss filed and entered (Allgood)—copies del. all attorneys of record—Page 78
Aug. 3	Motion of plaintiffs for a temporary injunction during the pendency of this appeal filed—copies served by counsel—Page 83
Aug. 3	Order denying application of plaintiffs for a stay order pending appeal filed and entered (Allgood)—copies del. to attorneys—Page 85
Aug. 3	Notice of appeal by plaintiffs filed—service accepted—Page 86
Aug. 3	Cost Bond on Appeal ($250) filed by plaintiffs—Page 88
Aug. 3	Appellant's designation of contents of record on appeal filed—service accepted
Aug. 3	Record on appeal certified for the U.S. Court of Appeals for the Fifth Circuit, New Orleans, La.—del. to appellants' attorneys for transmittal—Page 90

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, D/B/A O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Defendants.

COMPLAINT—Filed July 27, 1962

I

Plaintiffs present this complaint against the defendants to temporarily restrain and enjoin them from applying to the rail transportation of grain certain railroad tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South,* until the Commission can rule on their lawfulness.

[fol. 2] Plaintiffs do not seek any relief in this proceeding which would in any way interfere with the pending investigation before the Commission, or which would conflict with any decision of the Commission. They seek solely to maintain the status quo in an area where the Commission is powerless to grant relief, in order to prevent immediate, substantial and irreparable injury and damage to the plaintiffs, as will be hereinafter more fully set out. This is in accordance with the well established rule that a court of equity will intervene by way of a temporary injunction as an aid in the administrative process in advance of final administrative action.

II

A. Jurisdiction is founded on diversity of citizenship and amount.

(1) Plaintiff, Arrow Transportation Company (hereinafter called Arrow), is an Illinois corporation, having its principal place of business in Sheffield, Alabama.

(2) Plaintiff, O. J. Walls, d/b/a O. J. Walls Company, is a citizen of the State of Alabama.

(3) Plaintiff, John D. Bagwell Farms & Hatchery, Inc., is an Alabama corporation, having its principal place of business in Empire, Alabama.

(4) Plaintiff, City of Guntersville, Alabama, is a municipal corporation, incorporated, created and existing under the laws of the State of Alabama.

[fol. 3] (5) Defendant, Southern Railway Company, is a corporation, incorporated under the laws of the State of Virginia, having its principal place of business in Washington, D. C.

(6) Defendant, Louisville & Nashville Railroad Company, is a corporation incorporated under the laws of the State of Kentucky, having its principal place of business in the State of Kentucky.

(7) Defendant, St. Louis-San Francisco Railroad Company is a corporation incorporated under the laws of the State of Missouri, having its principal place of business in the State of Missouri.

(8) Defendant, Seaboard Airline Railroad Company, is a corporation incorporated under the laws of the State of Virginia, having its principal place of business in the State of Florida.

(9) The matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000.00. This Court has jurisdiction of this action by virtue of Title 28 USC Sec. 1332.

B. Jurisdiction is further founded on the existence of a federal question and amount in controversy.

This action arises under the constitution and laws of the United States as hereafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. This court has original jurisdiction of this action by virtue of Title 28 USC Sec. 1331.

C. Jurisdiction is further founded on the existence of a federal question arising under particular statutes.

[fol. 4] This action arises under the Clayton Anti-Trust Act, Title 15 USC Sec. 12, et seq., as hereinafter more fully appears, and this court has original jurisdiction of this action by virtue of Title 28 USC Sec. 1337.

III

(a) Plaintiff, Arrow, is a common carrier by barge operating under a certificate of convenience and necessity issued by the Interstate Commerce Commission with operating rights on the Tennessee River and its tributaries, and the Ohio and Mississippi Rivers between Louisville, Kentucky, and St. Louis, Missouri. It is actively engaged in transporting grain as a common carrier in competition with the defendants.

(b) Plaintiff, O. J. Walls, owns and operates a grain storage elevator and related facilities at Guntersville, Alabama. Said plaintiff is engaged in the business of buying, receiving, storing, selling and shipping grain in both intrastate and interstate commerce.

(c) Plaintiff, John D. Bagwell Farms and Hatchery, Inc., is engaged in the business of buying and storing grain, manufacturing feed and producing and selling broilers.

(d) Plaintiff, City of Guntersville, Alabama, is located on the Tennessee River in the State of Alabama, and is the site of a number of grain elevators, grain merchandisers, feed mills and related businesses which utilize common carriers by barge as the principal means of receiving [fol. 5] large interstate shipments of grain. The City of Guntersville is interested in this action for the reason that its grain industry is in great jeopardy in the event the tariff schedules above referred to become effective, endangering the prosperity, welfare and common good of its citizens.

(e) The defendants are common carriers by rail doing business in interstate commerce and transporting, among other commodities, grain in competition with the common carrier plaintiffs.

IV

During the year 1961 the defendants published drastically reduced rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to specified destinations in the southeast. Upon complaint by certain competing barge lines and other protestants, the Interstate Commerce Commission found with respect to the proposed rates that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .". The Commission suspended such proposed rates for 7 months, or until March 9, 1962, pursuant to Title 49 USC, Sec. 15(7) of the Interstate Commerce Act.

[fol. 6] Said Section provides that the Commission may suspend proposed rates for not longer than 7 months beyond the time when they would otherwise go into effect and that "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rates . . . shall go into effect at the end of such period."

V

The Commission certified that the issue was of great national transportation importance and initiated an extensive investigation into the lawfulness of the proposed rates. An Examiner of the Commission began hearings in the matter on January 6, 1962. To date these hearings are still in progress. Over 13,000 pages of testimony and 640 exhibits have already been received in evidence. Plaintiffs are informed and believe and upon such information and belief aver the fact to be that these hearings will not be completed prior to August 15, 1962, and that the Commission will not be able to render its decision on the merits until at least two months thereafter.

Plaintiffs further allege that they are informed by their counsel, which information they verily believe to be true and upon which information and belief aver as a fact, that upon final hearing the Commission will in all likelihood declare said rates unlawful, but even if so, plaintiffs aver that, unless said rates are suspended pending the hearing [fol. 7] by the Commission it might take as long as two years to exhaust the administrative and judicial process until the order of the Commission invalidating said rates actually become effective. Thus, for all practical purposes, the plaintiffs are in danger of having imposed upon them, for a long period of time, a schedule of destructive and unlawful rates without administrative or judicial or other due process and pending ultimate determination of the lawfulness thereof.

VI

The defendants have voluntarily extended the effective date of the proposed rates from March 9, 1962 to August 7, 1962, but defendants have declined plaintiffs' numerous requests that they voluntarily postpone the effective date beyond August 7, 1962 and until the decision of the Commission, and plaintiffs are informed and believe and upon such information and belief aver it to be the fact that the defendants will place the rates and charges into effect at 12:01 A. M. on August 7, 1962, unless restrained by this Court.

VII

As previously averred, the Interstate Commerce Commission has, under the limitations set out under Section 15(7) of the Act, exhausted its discretion and authority to further suspend said rail rate schedule, and is powerless to aid its own administrative process in order to prevent the irreparable harm and damage to the plaintiffs, which will be hereafter more fully shown.

[fol. 8]

IX

The plaintiffs aver that the proposed rates and charges are unjust, unreasonable and unlawful and were designed to serve primarily as a destructive competitive practice and device, and to discriminate against Arrow and other connecting common carrier barge lines. Substantially all of said rates are below the out-of-pocket costs of the defendant railroad carriers and all such rates are unreasonably lower than necessary to meet barge competition, and were proposed with the aim and purpose to monopolize the transportation of grain in interstate commerce in favor of the defendants and to the exclusion of Arrow and all other competing common carriers by barge, all in violation of the National Transportation Policy, and Sections 1 and 3(4) of the Interstate Commerce Act.

X

Plaintiffs further allege that the defendants are attempting to monopolize and have combined and conspired with each other in attempting to monopolize the transportation of grain in interstate commerce from the Ohio and Mississippi River ports to the southeast by drastically and unreasonably reducing their rates below their costs so as to destroy competition from the barge lines operating on the Tennessee River. Such attempt to monopolize the transportation of grain is in violation of Section 2 of the Sherman Anti-Trust Act, Title 15 USC Sec. 2.

The Commission has exhausted its statutory power to suspend these unlawfully low rates and has no authority or jurisdiction to prevent the defendants from effectuating [fol. 9] their attempted monopoly. Thus, the relief sought by the plaintiffs in this action is not a matter subject to the regulation, supervision or other jurisdiction of the Commission, within the meaning of the exception set out in Section 16 of the Clayton Act, 15 USC 26, and this Court is, therefore, authorized by said Section to grant injunctive relief to restrain the threatened violation of Section 2 of the Sherman Anti-Trust Act.

XI

The general public has a vital interest in the continued use of the Tennessee River for the transportation of commodities by barge. This public interest will be gravely injured if the proposed rail rates are permitted to become effective. Grain is a highly competitive commodity and tends to move by the lowest cost mode of transportation. The suspended rates are so much lower than the charges attendant upon barge transportation that it will result in the elimination of such means of transportation, and the Tennessee River will cease to be an important artery of commerce.

If the defendants are not restrained from carrying out their said monopolistic plans, Arrow will be compelled to surrender its certificate of convenience and necessity and the public will be deprived of the service now performed by Arrow in transporting grain and all other commodities. The proposed rates, by their inherent nature, are calculated to greatly prejudice the public interest by restricting the free flow of interstate barge transportation on the Tennessee River.

[fol. 10]

XII

The plaintiffs aver that the proposed rates are in disregard of the principles underlying the report and order of the Commission dated March 24, 1959, in Docket No. 30744, *American Barge Line Company, et al.* v. *Alabama Great Southern Railroad Co., et al.*, 306 I.C.C. 167, and the decision of the Court in the Northern District of Alabama in the case of *Arrow Transportation Co., et al.* v. *United States*, 176 F. Supp. 411. Thus, the defendant carriers will, pending final decision by the Commission in the said proceedings now being conducted by it, nullify and frustrate the relief heretofore obtained by plaintiff Arrow after years of bitterly contested and highly expensive litigation.

XIII

Plaintiffs further allege that the yearly volume of business of Arrow amounts to Two Million Dollars and that 80% of such business consists of freight charges arising out of the transportation of grain by barge in interstate commerce; that the total volume of business of the plaintiff, O. J. Walls, arising out of the operation of the grain storage, elevator and related facilities at Guntersville, Alabama, and in the receiving, storing, selling and shipping of grain in both intrastate and interstate commerce amounts to approximately Ten Million Dollars per year; that the value of the businesses in Guntersville, Alabama, whose prosperity depends upon the transportation of grain by barge line runs into many millions of dollars. Plaintiffs [fol. 11] further allege that if said rates are placed into effect the same will make it impossible for the plaintiffs, Arrow and Walls, to remain in business, and will cause them to lose their customers and revenues, and same will adversely affect the whole economy and prosperity of the citizens of the City of Guntersville. The plaintiffs will suffer immediate, great and irreparable harm, financial loss and damage, unless the injunctive relief prayed for is granted by this Honorable Court. Plaintiffs have no adequate remedy at law.

XIV

Plaintiffs further allege that the administrative decree of the Commission may be rendered ineffective, unless, pending final decision, the defendants are prevented by injunctive process of this Court from placing said tariff schedules into effect on August 7, 1962, and it is necessary to invoke the equity powers of this Court to protect the jurisdiction of the Commission in aid of the administrative process and to prevent irreparable injury.

Wherefore, the plaintiffs demand:

1. That the court enter a temporary injunction to preserve and maintain the status quo, enjoining and restraining the defendants from applying to the rail transportation

of grain the tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, said injunction to remain in effect until the entry by the Commission of a final order relating thereto.

[fol. 12] 2. That, if hearing and determination of plaintiffs' application for a preliminary injunction are not completed prior to 12:00 Midnight, August 7, 1962, the Court enter a temporary restraining order to maintain the status quo, restraining and enjoining the defendants from applying to the rail transportation of grain the aforesaid tariff schedules, said temporary restraining order to remain in effect until the hearing and determination of plaintiffs' application for a preliminary injunction.

3. That the plaintiffs have such other and further relief as may be equitable and appropriate in the premises.

Arrow Transportation Company, a corporation, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., a corporation, Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 1st Avenue N. W., Birmingham 3, Alabama, by: Morris K. Sirote, John C. Lovett, Lovett & Lovett, Benton, Kentucky, Attorneys.

[fol. 13] City of Guntersville, Alabama, a Municipal Corporation, by: Joe Starnes, Jr., Guntersville, Alabama, City Attorney.

Duly sworn to by Howard G. King, jurat omitted in printing.

[fol. 14] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed August 1, 1962

Come now plaintiffs Arrow Transportation Company, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms and Hatchery, Inc. and City of Guntersville, Alabama, and move the court for a preliminary injunction in the above entitled cause enjoining the defendants Southern Railway Company, Louisville and Nashville Railroad Company, St. Louis-San Francisco Railway Company and Seaboard Airline Railroad Company, their agents, servants, employees and attorneys, from applying to the rail transportation of grain the tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, until the entry by the Commission of a final order relating thereto.

The grounds in support of this Motion are:

[fol. 15] 1. Defendants published certain rates and charges on the transportation of grain from certain Ohio and Mississippi river ports to specified destinations in the southeast. These rates were suspended by the Interstate Commerce Commission until March 9, 1962, the maximum period within which such suspension may be ordered by the Commission. The defendants have voluntarily extended the effective date of the proposed rates from March 9, 1962, to August 7, 1962, but have declined to further extend the effective date of such rates.

2. The rates are under investigation by the Interstate Commerce Commission, pursuant to an investigation and hearing undertaken by it, and will, in the opinion of plaintiffs' counsel, be ultimately declared unlawful by the Commission.

The hearing before the Commission is still pending and the said rates will go into effect on August 7, 1962, without an adjudication as to their lawfulness. Immediate and irreparable injury, loss and damage will result to the plaintiffs unless the defendants are enjoined from applying the tariff schedules so published by them, all as more fully set out and described in the verified complaint filed in this Court on July 27, 1962.

3. The administrative decree of the Commission may be rendered ineffective, unless, pending final decision, the defendants are prevented by injunctive process of this Court from placing said tariff schedules into effect. Accordingly, [fol. 16] injunctive relief is sought not in opposition to but in aid of the administrative process. The plaintiffs have no adequate remedy at law.

If this preliminary injunction be granted, the injuries, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

Arrow Transportation Company, O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., By: Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 First Avenue North, Birmingham 3, Alabama, By: Morris K. Sirote, John C. Lovett, Lovett & Lovett, Benton, Kentucky, Attorneys for Plaintiffs.

City of Guntersville, Alabama, By: Joe Starnes, Jr., Guntersville, Alabama, City Attorney.

[fol. 17]

NOTICE

To: Southern Railway Company, a corporation
Louisville and Nashville Railroad Company, a corporation
St. Louis-San Francisco Railway Company, a corporation
Seaboard Airline Railroad Company, a corporation

Please take notice that the undersigned will bring the attached motion for a preliminary injunction on for hearing

before the Honorable Clarence W. Allgood, Judge of the United States District Court for the Northern District of Alabama or before such other judge who may be sitting in his place and stead, at the United States Court House, Birmingham, Alabama on the 1st day of August, 1962 at the hour of 10:00 A.M., or as soon thereafter as counsel can be heard. A copy of the complaint filed in said court is attached hereto.

Morris K. Sirote, Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 1st Avenue N., Birmingham 3, Alabama, John C. Lovett, Lovett & Lovett, Benton, Kentucky.

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Robert S. Hamilton being first duly sworn does depose and say as follows:

I am Vice President, Marketing and Research, Southern Railway System, with headquarters at Washington, D. C.

1. During the summer of 1961 as Assistant Vice President, Transportation Research, Southern Railway System, I devised a schedule of rates to be applied to the movement of grain in multiple car shipments into and within the Southeast. As the chief architect of these rates I consulted only with officers of Southern Railway System and at no time did I discuss the level of rates or the possibility of publishing rate reductions on grain with any representative

of any other railroad. To the best of my knowledge no other officer of Southern Railway System had any such discussions with any officer of any other railroad. Until approximately one week prior to publication of these reduced grain rates the exact scale forming the basis of the rates was known only to me.

[fol. 19] Southern Railway System announced the publication of reduced grain rates in July, 1961, the rates to become effective the following month. After announcement and publication several other railroads in the Southeast expressed dissatisfaction with Southern's unilateral action in publishing these rates without consulting with them through the usual channels. Other Southeastern railroads subsequently published a similar level of rates, however, in the case of one other railroad the scale varies to some extent from that used by Southern since this other railroad could not determine the exact scale used in the Southern publication.

There was absolutely no concert of action between Southern and any other railroad in connection with the determination and publication of these rates which subsequently were suspended by the Interstate Commerce Commission and are now being investigated in ICC Docket I & S 7656.

2. Southern has voluntarily consented to two extensions to the seven month suspension period which the Interstate Commerce Commission imposed under the law. The first of these extensions to which Southern voluntarily agreed was necessitated by a requested delay from October 10, 1961 until January 8, 1962 for the commencement of the hearings ordered by the Interstate Commerce Commission. The second extension, which was for a one month period, was necessitated by the illness of Southern's counsel which resulted in Southern's requesting a one month adjournment in the hearings.

[fol. 20] The net result is that due to voluntary postponements by Southern the effective date of the rates has been pushed forward from March, 1962 until August 7, 1962. During this period Southern has been deprived of needed revenues and the people of the South have been deprived of substantial rate reductions which, according to the extensive testimony before the Interstate Commerce Commission are badly needed to assure the preservation of the poultry and livestock industries and to which the people of the South are rightfully entitled. Southern cannot under the circumstances agree in good conscience to a further extension of the effective date of the rates. In my judgment it would be highly disruptive to anticipated business transactions which have been planned in contemplation of the reduced rates becoming effective on August 7, 1962.

3. The rates in question are applied equally regardless of whether the grain is grown at the point of origin or whether it is shipped in by rail, barge or any other mode. They are based on a mileage scale and in every instance are directly related to the short line railroad mileage from origin to destination.

4. There is testimony in the record before the ICC in I & S-7656 to the effect that Southern will publish these rates from any origin to any destination wherever there is [fol. 21] a request for such publication. Although Southern does not serve Guntersville, it is willing to publish these rates from Chattanooga and any other Tennessee river port it serves. The L & N Railroad, in my judgment, can and will publish rates from Guntersville to meet competitive rates from other Tennessee ports. This would be done when Southern published rates from Chattanooga.

5. Southern has offered on the record to publish single car rates when the multiple car rates go into effect. Southern's willingness to publish single car rates on the same bare transportation basis has been stated publicly many times and has also been stated on the record in the ICC proceeding. The single car rates will exceed the multiple car rates only by the amount necessary to cover the increased cost to Southern of handling such shipments.

6. There have been allegations that the large aluminum covered hopper cars involved in Southern's multiple car grain rates are no technological breakthrough. Twenty years ago, or even ten years ago, metallurgical science had not advanced to the point which would have made these high capacity cars possible. In fact, it was necessary for

Southern to utilize the services of several outstanding engineering consulting firms as well as the engineering [fol. 22] staff of Lockheed Aircraft in developing a satisfactory design.

Robert S. Hamilton

Subscribed and sworn to before me this 1st day of August, 1962. Roberta Murray, Notary Public. My Commission expires March 21, 1966.

[File endorsement omitted]

[fol. 23] IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed August 1, 1962

District of Columbia, ss.

Robert S. Hamilton, Vice President, Transportation Research, Southern Railway Company, being duly sworn deposes and says:

The South is a deficit area for grain; large quantities of grain must therefore be brought into the South from the surplus producing areas of the Middle West.

Grain consumption in the South has increased tremendously in recent years. The rail carriers have not shared in this increase. The traffic is being handled into Southern Territory predominantly by itinerant unregulated trucks and to a lesser extent by water carriers, much of it in private and exempt water carriage. Truckers haul northbound such commodities as citrus, potatoes, lumber, furniture and pipe and bring back grain from the Middle West as a "backhaul." These trucks are free to handle grain on a buy-sell basis (and many do) or to charge whatever they can get for bringing back a particular load of grain.

At my direction, McKinsey & Company, a consulting firm of international repute, undertook for us an analysis to determine what modes of transportation are used to bring grain into the South.

[fol. 24] McKinsey's analysis revealed that from 1955 to 1959, the grain deficit in the Southeast rose from 3.6 million tons to 10.8 million, and that the various transportation modes divided the traffic as follows:

	1955	*1959*
Rail	56%	20%
Barge	25%	20%
Truck	19%	60%

While the truck share rose from 19 percent of the total to 60 percent in the five-year period, the water share of the market shrank and the rail share plummeted to a fraction of what it had been.

It was to meet this problem that these rates were published. The truck grain is exempt from regulation by the Interstate Commerce Commission as an exempt agricultural product and the barge grain is exempt under Section 303(b) of the Interstate Commerce Act, 49 USC Section 903. Under this bulk exemption provision, the water carriers are free to charge any rate they see fit.

Southern, after several years of research and planning, has developed and now owns several hundred lightweight aluminum hopper cars of high capacity which have been developed to handle bulk commodities such as grain. These cars have a capacity of 100 tons of corn or wheat, whereas the conventional box car now in general use for handling grain normally carries about 50 tons or slightly more. [fol. 25] Using this high capacity hopper car equipment in multiples of five, ten or twenty cars and offering only bare transportation service without frills (no transit, no switching absorption, only 24 hours free time for loading and unloading) Southern proposes to handle volume grain shipments from the Ohio and Mississippi River gateways (Memphis, St. Louis, Evansville, Louisville and Cincinnati) at rates that will be highly profitable to it and which will effectively compete with unregulated trucks and barges. The proposed volume rail rates require a minimum shipment of 450 tons. These rates will return a large amount of traffic to the railroads, but they will not eliminate barge transportation on the Tennessee or any other river.

Much of the grain moving into Southern Territory by truck is moving from areas that barges are not serving or areas from which no barge grain has ever moved into the South. From those areas the *only* competition faced by the railroads is the unregulated trucker. Also, from areas such as Evansville, and St. Louis, from which some barge grain does move into the South, the trucker is a definite competitive factor also. For example, truck grain is moving deep into the South from the very shadow of the barge-loading facilities at St. Louis. Therefore, even from areas that are originating barge grain, the truck is also an active competitive factor in the movement of grain. [fol. 26] No barge grain moves into the Tennessee River from ports on the Ohio River which are east of the Evansville, Indiana area; no barge grain moves from either Cincinnati or Louisville to the Tennessee River ports.

Some barge grain does move from the Evansville area and from St. Louis, but the preponderance of the barge movement to the Tennessee River is from the Illinois Waterway and the upper Mississippi River north of St. Louis. The principal barge origins are therefore in areas Southern Railway does not serve and from which no reduced multiple-car rail rates are proposed either by Southern or by any other rail carrier.

The published rates on grain of the water lines, which may be adhered to or not as they see fit, are $2.39 per ton from St. Louis to Guntersville and $2.11 from Evansville to Guntersville. These may be compared with the rail rates that have been proposed of $3.21 per ton from St. Louis and $2.58 from Evansville. Today's published barge rates are lower therefore by 62 cents from St. Louis and 47 cents from Evansville than the proposed new multiple-car rail rates.

Grain today is moving by barge to Guntersville and other Tennessee River ports both for storage and for processing. About 45 percent of the grain moving to the Tennessee River ports is actually processed at such ports. The rail- [fol. 27] roads will not be in position to divert from the barge lines that grain traffic which is moving to the Tennessee River ports for processing and the merchandisers located at the Tennessee River ports will, in my judgment, continue to operate and continue to use barge transportation to a substantial extent. One such merchant, who also operates a large feed mill at Guntersville, has testified before the Interstate Commerce Commission in I&S 7656 that his company is presently serving their Guntersville facility by barge and will continue to do so after the volume rail rates become effective.

The present rail rates are based on a single car minimum weight, whereas the proposed rates require a minimum shipment of five cars with a minimum weight of 450 tons per shipment. The present single car rail rates are subject to transit, *i.e.*, the grain may be stopped for storage or for processing and the shipper is only required to pay the through rate from origin to destination rather than a combination of local rates. The furnishing of transit services is very expensive for the railroads because transit not only involves extensive clerical work, but it also encourages shippers to make use of the most circuitous rail routes, which inevitably increases the cost to the railroads of providing such service. In designing the multiple-car rates, which will cover only bare transportation service [fol. 28] without transit, it was my purpose after studying the cost-revenue relationship on the present single-car rates to establish multiple-car volume rates that would return approximately the same profit per hundred pounds. Actually the proposed multiple-car rates will provide a slightly greater profit per 100 pounds or per ton than the present single-car rates; this, because no "extras" are offered under the proposed rates, and the economies of volume transportation and maximum equipment use substantially reduce rail costs of providing the service. The volume of grain traffic transported by Southern under the multiple-car rates will be very materially increased.

Based on actual studies of the movement of these high capacity aluminum hopper cars, the proposed rates will be highly profitable. In contending the proposed rates are at or near out-of-pocket costs, the protestants have ignored many operating facts that must be considered in pricing out the operation being proposed. Neither the equipment utilization nor the length of haul under the proposed rates is "average"; therefore, average costs are not meaningful with respect to this traffic. Based on Southern's cost studies which were made under my supervision and direction, the proposed rates will provide revenues that are more than 140 percent of the costs.

[fol. 29] The rates proposed will apply to all connecting lines alike. If grain comes to St. Louis or to Evansville by water and moves beyond by rail on the multi-car rates, that grain will pay no more and no less than rail grain which has moved to those storage points or than truck grain which has moved to those storage points. All grain will be treated exactly alike under the proposal no matter what mode of transportation has handled it prior to movement on the multi-car rates.

The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners have been highly in favor of the rates and have given active support. The United States Department of Agriculture has also actively supported the proposed volume rail rates throughout the proceeding before the Interstate Commerce Commission. Receivers and processors all over the South, too numerous to name, have also supported the rates.

Southern initiated these volume grain rates and Southern alone. No other railroad was consulted prior to Southern's announcement of the proposed rates, and after Southern's rates were announced, the other railroads, some reluctantly, published the same rates for competitive purposes.

Robert S. Hamilton

[fol. 30] Subscribed and sworn to before me this 28th day of July, 1962.

P. K. Howard, Notary Public of District of Columbia.
My Commission expires May 1, 1965.

[File endorsement omitted]

[fol. 31]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed August 1, 1962

District of Columbia, ss.

James L. Tapley, being duly sworn, deposes and says he is an attorney and counsellor at law associated with the defendant, Southern Railway Company, and that he has knowledge of all the facts hereinafter set forth:

Hearings in I. & S. 7656, now pending before the Interstate Commerce Commission, began January 8, 1962. Respondents' direct case, at which time respondents and parties supporting respondents presented their witnesses, consumed 24 hearing days from January 8 to February 8. During this time 52 witnesses testified and the record amounted to 3,037 pages of transcript.

Protestants' case was heard between February 13 and June 11. Eighty-six witnesses presented evidence. This took 58½ days and 7,375 pages of transcript.

Respondents' rebuttal case started June 11. Through July 27, the rebuttal portion of the proceeding has taken 33½ days. Thus, a total of 116 hearing days have been used as of July 27; the record already amounts to 13,760 pages and 660 exhibits; and 152 different witnesses have testified.

[fol. 32] In order to expedite the hearing and to minimize the time for presentation of direct evidence, respondents prepared rebuttal evidence in prepared statement form for most of the witnesses and this material was distributed to opposing counsel and the presiding examiner well in advance of the appearances of the witnesses on the stand. Because the rebuttal statements have been prepared in this manner, little time has been consumed for the purpose of presenting direct testimony; the prepared statements have been received for the record as exhibits and the hearing time since June 11 has been devoted largely to cross-examination of the rebuttal witnesses by protestants' counsel.

Protestants' cross-examination of rebuttal witnesses has been extremely lengthy. For example: Witness Haldeman, who presented a rebuttal statement of 69 pages, was cross-examined on 9 days, June 26 through July 11, a total of 731 pages of the record being consumed for cross-examination of this witness alone. Witness Hodges, who presented a rebuttal statement of 23 pages, was cross-examined 7 days for a total of 505 pages of the record given over to his cross-examination alone. Witness Saunders, who is still on the stand, presented a rebuttal statement of 101 pages and as of July 29, this witness had been on cross-examination for 4 days and 349 pages of the transcript and only about 1/3 of the witness' statement had been covered in [fol. 33] that time by the cross-examiner, the other 2/3 still remains to be treated with.

James L. Tapley

Subscribed and sworn to before me this 28th day of July, 1962.

P. K. Howard, Notary Public of District of Columbia.
My Commission expires May 1, 1965.

(Seal)

[File endorsement omitted]

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County, ss.

Dewey E. Walley of Oxford, Alabama, being duly sworn deposes and says:

I am vice-president and co-owner of Walley Milling Company in Oxford, Alabama, where I engage in a feed manufacturing and poultry producing operation. We use 17,000 bushels of grain weekly. A very small percentage of which is locally produced. On an annual basis only about 10% of our grain comes from grain merchants at Guntersville whereas almost 90% of our annual grain receipts come by means of itinerant and unregulated trucks from the Middle West, Illinois and Indiana and Ohio and even occasionally from Michigan and Iowa. Although our mill is only 60 miles from Guntersville we are in no sense dependent on grain receipts from the Tennessee River, Guntersville, or any other Tennessee River port. In my area grain rates by [fol. 35] itinerant trucks from the Middle West have increased tremendously in recent years and are now the decisive transportation means of bringing grain in.

When the proposed volume rail rates which we vigorously supported before the Interstate Commerce Commission become effective we are in a position to use them and will use them. My firm and the poultry, hog and egg producers associated with it would be denied an income that would be a minimum of $50,000 per year and in all probability would exceed $75,000 if these proposed rail rates are not permitted to be put in effect.

Dewey E. Walley

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 36]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Before me, the undersigned authority in and for said County and State, personally appeared Thomas L. Melton, who being by me first duly sworn on oath deposes and says as follows:

My name is Thomas L. Melton, and I am a resident of Guntersville, Alabama. I am employed by Southern States Cooperative in the capacity of Traffic Manager of the Southern States Cooperative feed mill located in Guntersville and have held this position for the past five years. The principal business of this mill is the manufacture of finished feeds, and it is one of the three largest feed mills in Guntersville doing a business of approximately 125,000 tons a year. In my capacity as Traffic Manager I am directly responsible for the movement of all grain purchased for the use of this mill from the point of purchase to Guntersville. I am thoroughly familiar with the comparative costs [fol. 37] of the shipment of grain from our points of purchase to Guntersville by barge, rail and truck, including the multiple car grain rates at issue in this case. On the basis of a determination that shipment of grain to Guntersville by barge is substantially less expensive than shipment by other means of transportation, Southern States Cooperative has used barge transportation exclusively for the past five years except for the brief period during which such transportation was rendered impossible by the break in Wheeler Dam. Under the present barge rate tariffs the shipment of grain to Guntersville by barge will continue to be the most economical means of moving our grain after the effective date of the new multiple car rail grain rates. Southern States Cooperative will continue to transport its grain to Guntersville by barge after those rates become effective, and we do not anticipate any adverse business effects from the introduction of the new rail grain rates. The Guntersville mill is an established facility of Southern States Cooperative and it is the intention of Southern States to continue its Guntersville operation indefinitely. While the reduced multiple car rail grain rates will not be useful to us in moving grain to the Guntersville mill, they do not in any way affect our evaluation of the economic future of Guntersville or our intention to continue the operation of our mill at Guntersville.

[fol. 38] Allied Mills, which also operates a large facility at Guntersville (feed mill about the size of ours and a soybean processing plant as well) is in the process of constructing a Marine facility which will handle 10,000 bushels of grain per hour from barges. This is a modernization of their present Marine facility which will enable much faster unloading of barge received soybeans and corn. They are making this large expenditure with the full knowledge that the proposed volume rail rates are about to become effective.

Thomas L. Melton

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Before me, the undersigned authority in and for said County and State, personally appeared W. Herman Clark, who being by me first duly sworn on oath deposes and says as follows:

My name is W. Herman Clark and I reside at 325 Magnolia Avenue, Statesville, North Carolina. I am Traffic Manager for Statesville Flour Mills and have held that position for five years. For six years before I became Traffic Manager I was Assistant Traffic Manager of the same company. Statesville Flour Mills is in the business of milling flour and milling and mixing grain feed. Its daily output of flour is approximately 240,000 pounds and its weekly output of mixed feed is approximately 600 tons. Statesville Flour Mills employs about 150 employees in its plant at Statesville and has eight warehouses within a radius of 200 miles of Statesville, each of which employs from 3 to 5 employees.

[fol. 40] Statesville Flour Mills anticipates receiving approximately 800,000 bushels of wheat from Kansas, 700,000 bushels of wheat from Cincinnati and 365,000 bushels of corn from Cincinnati within the next twelve months. Of that amount 600,000 bushels of wheat from Kansas, 100,000 bushels of wheat from Cincinnati and 15,000 bushels of corn from Cincinnati have already been booked. We have already bought all of the local wheat available which has practically been stopped at this time due to many factors, including particularly the Soil Bank program and farmers leaving the farms.

On the wheat and corn, as stated above, that we will receive from Kansas and Cincinnati, I have calculated the freight charges that will have to be paid under the present system of rates and also the freight we will have to pay on such shipments according to the published rates of Southern Railway Company and other railway companies which we hope will become effective August 7, 1962. The published rates will cost us $246,780 less than the present rates.

Of course, I am better acquainted with the operations of Statesville than any other company in the business of milling or processing grains, but I know that throughout many states in the South and the Southeast there are several hundred companies engaged in such business and that generally, except for differences in the length of haul, the proposed freight rates would effect, percentage wise, cor- [fol. 41] responding savings in costs of freight shipments of grain to them from Kansas and Cincinnati. Generally they would have the same sources of supply, that is Cincinnati and Kansas, as we do.

My knowledge of the affairs of millers, farmers, and those engaged in raising poultry and live stock convinces me that their most critical need today is reduced rates on whole grains from the west to the south and that the proposed rates will be of great benefit to them and to the public as a whole that may be affected by their welfare. It is the intention of our company, and I am sure it is the intention of other companies, to pass on to the public a just share of our anticipated savings.

Although we have been dependent to a great extent upon barges from Kansas City to Chattanooga for shipments of hard wheat on account of the lower costs to us by such method of shipment, the barge facilities have not been adequate for our needs during the last several months. The explanation that has been given us was that the barges were being used on the Mississippi south of St. Louis to New Orleans for foreign shipment. I have carefully calculated the amount of extra expense to Statesville Flour Mills that has been caused by inadequacy of facilities for shipment by barge, which in turn has required us at times to ship all

the way by rail. The amount of such loss to us to date during the past several months has been $61,050.
[fol. 42] In anticipation of the proposed multiple car freight rates going into effect on August 7, Statesville Flour Mills has purchased equipment and made changes of a material nature to accommodate hopper cars which are to be used in the shipment of grain. I am unable to state the amount of expense that has been incurred in this respect, but it has been considerable. It is my understanding that other mills throughout the affected regions have made similar arrangements and have incurred substantial expense in doing so.

W. Herman Clark

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT OF SAM H. FLINT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Sam H. Flint, being duly sworn, deposes and says:

I am General Traffic Manager of the Quaker Oats Company, Chicago, Illinois, with which I have been associated since 1953. From 1946 to 1952 I was with the Georgia Public Service Commission as Director of its transportation division. During that time, by reason of my association with Walter R. McDonald, who was then and still is a member of the Georgia Commission, President of the Southeastern Association of Railroad and Utilities Commissioners and Chairman of the Freight Rate Committee of the Southern Governors Conference, I became active in the work of both the Southeastern Association and the Southern Governors Conference.

The Southern Governors Conference has been for twenty-five years actively endeavoring to obtain reasonable freight rates from, to and within the South. Both the Conference and the Southeastern Association have participated in many negotiations and in a number of proceedings before the Interstate Commerce Commission and the courts seeking freight rate relief. Neither of these organizations is allied with or interested in any specific segment of the economy of the South nor in any particular mode of trans- [fol. 44] portation; rather, these organizations represent and speak for all segments of the South's economy, producers, processors and consumers.

The Southern Governors and the Southeastern Association of Railroad and Utilities Commissioners have been trying for many years to secure relief from the inordinately high level of rates on grain. The Southeastern Association is the title plaintiff in a major complaint case seeking lower rates on grain which is now before the Interstate Commerce Commission in Docket 31874. Both the Southern Governors and the Southeastern Association have supported and approved the volume grain rates proposed by the railroads in I & S Docket 7656 in which I testified as spokesman for these groups. We urged the Commission not to suspend these rates and after the suspension we sought vacation of that suspension order.

The public, all segments of it, will benefit as a result of these low volume grain rates. These benefits have been withheld for almost one year. The Southern Governors Conference and the Southeastern Association are of the view that these rates should not be withheld from the public any longer. Every day that the effectiveness of these rates is delayed results in irreparable damage to thousands of

Southern producers and processors and millions of Southern consumers.

Sam H. Flint

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires: 12-2-62.

[File endorsement omitted]

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

Howard G. King, being first duly sworn, deposes and says:

1. That he is President of Arrow Transportation Company, a plaintiff in the above-entitled proceeding; that he is familiar with the traffic handled by that carrier and with its relative importance to the revenue and welfare of that carrier.

2. That Arrow Transportation Company is a common carrier by water, operating under and pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission; that such operations are principally on the Tennessee River; that the major portion of the traffic of Arrow Transportation Company consists of various types of grains moving to the Tennessee River Ports, more than 80% of which is thereafter transported by land carrier from those Tennessee River ports to various processing and consuming points in the Southeast;

[fol. 46] 3. That during the calendar year 1960, the movement of such grains provided over 68% of the total tonnage of Arrow Transportation Company, and produced for it more than two million dollars in revenue, which was more than 80% of its total revenues; and that there was a material change during 1961 because of the collapse of the lock wall at Wheeler Dam but that thus far in 1962 the volume of such traffic and the revenues provided thereby approximated those of 1960;

4. That if the railroad rates on such grains, published and filed with the Interstate Commerce Commission in the tariff publications described in the Complaint in this proceeding which are scheduled to become effective at midnight on August 6, 1962 are permitted to become effective and the railroads are permitted to charge the reduced rates published in the said tariffs, all as more fully described in the Complaint in this proceeding, Arrow Transportation Company will suffer immediate, great, and irreparable injury;

5. That the said tariffs would permit the charging of rail rates on grain moving to points in the Southeast at levels below the charges attendant upon water movement and the rates charged by the railroads for transportation of grain from the Tennessee River ports to interior points in the Southeast, and it has been the experience of Arrow Transportation Company, since it commenced operations many years ago, that it never has been able to participate in any traffic whatsoever when the charges attendant upon the barge movement were on a parity with or were above competitive rail rates;

[fol. 47] 6. That the result of application of the rail rates published in the said tariffs would be to divert from Arrow Transportation Company practically all of the grain traffic which it presently is handling and for many years has handled; that such diversion would result in loss of revenues to Arrow Transportation Company to the extent of approximately two million dollars per year; that the loss of such revenues would cause Arrow Transportation Company serious and irreparable injury, would result in the immediate impairment and the ultimate destruction of its ability to continue to provide common carrier service under and pursuant to its certificate of public convenience and necessity, and would make it impossible for this Company economically and efficiently to serve the shipping public in the transportation of other traffic which it now handles, resulting in a complete loss of all other traffic;

7. That there would be no adequate remedy for these injuries which are certain to follow if the rail carriers are permitted under the authority of the said tariffs to make effective the reduced rates published therein.

8. That these proposed rates will cause immediate loss of revenue to Arrow Transportation Company, and if the rates are maintained over a period sufficiently long to enable more grain buyers to accommodate themselves to receive, unload and store multiple car shipments, the rates will cause this Company's operations to become unprofitable, will inevitably result in the liquidation of its assets and insolvency, will cause Arrow Transportation Company to cease operating on the Tennessee River and will force [fol. 48] its surrender of its certificate of convenience and necessity.

Howard G. King

State of Alabama,
County of Colbert, ss.

Subscribed and sworn to before me, a Notary Public, in and for the county and state aforesaid, this 1st day of August, 1961. Katherine Shirley, Notary Public. My commission expires: Feb. 12, 1966.

[File endorsement omitted]

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

SUPPLEMENTAL AFFIDAVIT—Filed August 1, 1962

Howard G. King, being first duly sworn, deposes and says:

1. This affidavit is filed to supplement my previous affidavit filed herein dated August 1, 1962.

2. I am familiar with the tariff schedules filed by the defendant railroads, the lawfulness of which is presently under investigation by the Interstate Commerce Commission. These tariff schedules are said to be based upon a formula. That formula is based upon a figure of 42¢ per ton to cover origin and destination terminal services and 5.73 mills per ton mile to cover the line haul service, subject to a minimum rate of $2.40 per ton. Under the formula the minimum rate is absolute to a distance of 346 miles. The rates apply only on a minimum of five car shipments subject to an aggregate minimum rate of 450 tons per shipment and to a minimum weight per car of 90 tons or full visible capacity, whichever is greater. The proposed rates on 10 car shipments with a minimum of 900 tons per ship- [fol. 50] ment and on 20 car shipments with a minimum of 1,800 tons per shipment are made in flat amounts of 10¢ and 20¢ per ton, respectively, lower than the rates proposed on the five car shipments.

3. The origin from which specific rates are published embrace only St. Louis, Missouri, Cairo, Illinois, Memphis, Tennessee and the Ohio River crossings of Evansville, Indiana, Louisville, Kentucky and Cincinnati, Ohio. The rates specifically published from such origins apply from intermediate origins on certain direct tariff routes to a

particular destination. The rates do not apply, for example, from the port of Guntersville, Alabama on the Tennessee River because such port is not an intermediate origin within the meaning of the tariff.

4. The following table will illustrate the drastic reductions in rates which have been proposed from the ports of St. Louis and Evansville to four representative destinations in the southeast and the high present rate from Guntersville to the same destinations which will continue in effect.

COMPARISON OF ILLUSTRATIVE RATES
PRESENT AND PROPOSED

	From St. Louis			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	601	$10.10	$3.86	139	$3.10	None
Birmingham, Ala.	472	8.70	3.12	71	2.20	None
Gainesville, Ga.	654	10.50	4.17	192	3.30	None
Orangeburg, S. C.	847	12.50	5.27	385	6.00	None

[fol. 51]

	From Evansville			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	441	$ 8.30	$3.98	139	$3.10	None
Birmingham, Ala.	361	7.10	2.67	71	2[illegible]	None
Gainesville, Ga.	494	8.90	3.28	192	3.[illegible]0	None
Orangeburg, S. C.	687	10.90	4.36	385	6.00	None

Barge Rate: St. Louis, Mo. to Guntersville —$2.39
Evansville, Ind. to Guntersville— 2.11
Transfer charge at Guntersville— .89

5. At the present time the lowest cost transportation available to shippers in St. Louis on a shipment to Birmingham, Alabama is $5.07 per ton. This movement would be via barge from St. Louis to Guntersville, thence via truck to Birmingham. The barge rate is $2.39 per ton. The transfer charge is 89¢ per ton and the truck charge is $1.79 per ton. The barge-rail combination from St. Louis via Guntersville to Birmingham is $5.48 per ton. The all-rail rate from St. Louis to Birmingham is being reduced by the

railroads from \$8.70 per ton to \$3.12 per ton. If these rates go into effect, grain buyers at Birmingham would no longer buy grain which had moved by barge. To do so they would be required to pay a \$1.95 premium. At the present time Arrow transports large quantities of grain to Guntersville which is later trans-shipped to Birmingham. If the rates go into effect, all of this traffic, of course, would be lost to Arrow. A similar situation will exist at such destinations as Spartanburg, S.C. where the premium which the purchaser would be required to pay in order to buy barge grain would be \$4.48 per ton and the premium that purchasers at Augusta, Georgia would be required to pay would be \$2.74. At the present time Arrow is transporting substantial quantities of grain from St. Louis to Gun-
[fol. 52] tersville which is later trans-shipped from Guntersville, to Spartanburg, and Augusta. All of this business will be lost if the proposed rates go into effect.

6. The foregoing are merely a few illustrative examples of the intolerable rate situation which will prevail if these proposed rates are not enjoined.

Guntersville, Alabama is not a major grain consuming point. Substantially all of the grain transported to Guntersville via barge is subsequently trans-shipped to interior consuming points by rail or truck. If the proposed rates go into effect, the only barge grain which will be received at Guntersville will be that which can be consumed locally in the immediate vicinity of the port.

Howard G. King

State of Alabama,
Jefferson County.

Subscribed and sworn to before me, a Notary Public, in and for the county and state aforesaid, this 1st day of August, 1962. Marion Dockery, Notary Public. My Commission expires: May 3, 1965.

[File endorsement omitted]

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
County of Jefferson.

John D. Bagwell, Jr., being first duly sworn deposes and says:

I am President and principal stockholder of John D. Bagwell Farms and Hatchery, Inc., Route 1, Empire, Alabama. This Company is an integrated broiler producing concern. This means that we purchase grain and grind and mix it into prepared feed. We feed this prepared mix to broilers which we then sell to broiler processing plants. Our major competitors in producing broilers are large national concerns such as Ralston-Purina, Pillsbury and Quaker Oats who have similar integrated broiler operations scattered throughout the Northern part of Alabama.

Our Company is not located on a railroad, consequently we receive practically all of our corn from Guntersville, Alabama. We purchase approximately 25,000 bushels of barge corn per week and transport it 65 miles from Guntersville to our plant in our own fleet of trucks. I estimate it would cost approximately $150,000.00 for our company to equip itself to make use of the multi-car rates which are now under investigation by the Interstate Commerce Commission. Our entire business has been built upon the availability of low cost barge grain at Guntersville.

The national concerns who are my competitors are presently equipped to receive, unload and store multiple car shipments of grain. If the proposed rates go into effect on August 7 those concerns will be in a position to use [fol. 54] the rates immediately and, with the lower rates, will be able to produce broilers and substantially undersell our company.

Broiler production is a highly competitive business. The cost of grain represents 33⅓% of the total cost of producing broilers. It is not unusual for 1 cent or 2 cents per bushel difference in the cost of grain to represent the difference between profit and loss in the production of broilers.

If the multi-car rates go into effect on August 7, I will be faced with the alternative of either investing approximately $150,000.00 in rail facilities in order to use the multi-car rates or suffer a serious and immediate competitive disadvantage. If I make the investment and the ICC should then declare the multi-car rates unlawful my investment in the facilities will be sacrificed. In either event, I will suffer serious and irreparable damage and injury if the rates go into effect on August 7.

John D. Bagwell, Jr.

Subscribed and sworn to before me by John D. Bagwell, Jr., on this the 24th day of July, 1962. Donald Graham, Notary Public. My commission expires: 1/12/66.

[File endorsement omitted]

[fol. 55]

In the United States District Court
For the Northern District of Alabama
Southern Division

Civil Action No. 10224

[Title omitted]

Affidavit—Filed August 1, 1962

State of Alabama,
Marshall County.

Before me, the undersigned authority in and for said County, in said State, personally appeared Dr. T. E.

Martin, who being by me first duly sworn, deposes and says:

I am Mayor of the City of Guntersville, Alabama and have occupied that office for eight years. The City of Guntersville participated actively in the proceedings before the Interstate Commerce Commission in Docket 30744, *American Barge Line Company, et al. v. Alabama Great Southern Railroad Company, et al.*, and was a party to the proceedings in the statutory three-Judge Court in the Northern District of Alabama, which reviewed the Commission's decisions in those proceedings. On July 17, 1962 the Interstate Commerce Commission served its latest order in those proceedings, which order by its terms gives effect to the decisions of the statutory three-Judge Court and in effect directs the railroads to publish non-discriminatory ex-barge rail rates from Guntersville and other Tennessee River ports to the Southeast.

In addition the City has participated actively before the Commission in the hearings investigating the lawfulness of the proposed multi-car rail rates on grain, which are currently under suspension but which unless restrained by this Court will become effective on August 7, 1962 without any prior decision on the merits by the Commission. This will nullify the relief finally granted by the Interstate Commerce Commission in its recent Docket 30744 order after nearly twelve years of litigation.

[fol. 56] The City has participated in these proceedings because the economic welfare of the City is to a large degree dependent upon the grain industry located at our City which relies upon inbound barge movements of grain. At the present time this industry employs approximately seven hundred people, has a gross pay roll of some one and one-half million dollars, and represents an investment of many millions of dollars.

The City is opposed to any manipulation of rail rates which will discriminate against Guntersville and in favor of River ports on the Ohio and Mississippi Rivers. The proposed multi-car rates will seriously handicap, if not actually eliminate, the barge transportation of grain to

Guntersville, and unless these rates are enjoined they will have a devastating effect on the economy of this City.

T. E. Martin

Sworn to and subscribed before me on this 24 day of July, 1962. Polly D. Taber, Notary Public. My commission expires 7-8-64.

[File endorsement omitted]

[fol. 57]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August, 1962

John C. McWilliams, being first duly sworn, deposes and says:

1. That he is engaged in private practice as a transportation consultant, statistician, and cost analyst; that his experience in such matters covers a period of 26 years including employment from March, 1936, to August, 1942, in the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, and, upon the creation of a Cost Finding Section within the Commission, assignment to that new section; that his duties in the Cost Finding Section included participation in the drafting of formulas for analysis of the costs of various forms of transportation, the application of such formulas, and the analysis of costs and other statistical studies introduced in cases before the Commission.

That for three years, from August, 1942, to August, 1945, he was employed by the American Trucking Associations as Director of Research and Chief Economist; that his duties in these capacities were a continuing analysis of motor carrier and railroad costs; that since August, 1945, he has been engaged in private practice with the principal emphasis of his work having been analysis of transportation costs; and that he has testified on these matters in numerous cases before the Interstate Commerce Commission and before regulatory commissions of some 20 states.

[fol. 58] 2. That he has made a detailed study of the costs that would be incurred by the respondent railroads in transporting grain under the rates involved in Interstate Commerce Commission I. & S. Docket 7656; that this detailed study was made following the principles set forth in the cost formula designated by the Commission as Rail Form A; that this formula is the standard formula used by the Cost Finding Section of the Commission in all of its publications involving costs and is the only formula which has wide acceptance among private cost consultants for use in estimating rail costs; that such formula provides for modifications of certain of the cost details when an adequate basis for such modification is shown to exist; that all such modifications which were properly supported were made by him in his application of the costs to the movement of the grain in question.

3. That the said study of costs with respect to the movement of grain in jumbo covered hopper cars loaded to 100 tons per car moving 500 tons per shipment disclosed:

(a) That for 60 routes of the Southern Railway System involved in the proceeding the revenues would be below out-of-pocket costs and that for all 185 routes of the Southern Railway System the average revenue would be only 2 percent above out-of-pocket costs.

(b) That for 1184 routes of railroads other than the Southern Railway System the revenues would be below out-of-pocket costs and that for all 1333 routes the average revenue would be only 82 percent of the out-of-pocket costs.

(c) That for all of the routes published by all of the railroads involved in I. & S. Docket 7656 the revenue would be below out-of-pocket costs for 82 percent of such routes [fol. 59] and that for all of the routes the revenue would be only 84 percent of the out-of-pocket costs.

John C. McWilliams

District of Columbia, ss.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 26th day of July, 1962. Carroll F. Genovese, Notary Public. My Commission Expires Oct. 15, 1965.

[File endorsement omitted]

[fol. 60]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

O. J. Walls, being first duly sworn, deposes and says:

My name is O. J. Walls, I am the owner and manager of the O. J. Walls Company of Guntersville, Alabama. This company is actively engaged in the business of buying and merchandising grains of various types. At the present time I am equipped to receive grain, both by rail and barge, and own an elevator at the dock site having a capacity of 60,000 bushels. I was the first grain merchant operating on the Tennessee River, having built my first elevator at Guntersville in 1940.

At the present time I buy and merchandise approximately 7 million bushels of barge grain and 1 million bushels of local grain annually. I buy my barge grain at ports on the Missouri, Mississippi, Ohio and Illinois Rivers, including St. Louis and Evansville. The multi-car rates as proposed by the Southern Railway Company, which are now under investigation by the ICC, will drastically reduce quantities of grain handled through my elevator at [fol. 61] Guntersville and, if they remain in effect for a period of more than a few months, will force me out of business.

At the present time I am shipping grain by rail to customers at a number of destinations in the Southeast who are equipped to receive, unload and store multi-car shipments of grain. Among these customers are Security Mills, Jacksonville, Florida; Morbutt Milling Company, Augusta, Georgia; McMillan Milling Company, Monroe, North Carolina; Western Grain Company, Birmingham, Alabama; Cosby Hodges Milling Company, Birmingham, Alabama; Allstar Milling Company, Albermarle, North Carolina; Spartan Grain and Milling Company, with two plants located at Spartanburg and Newberry, South Carolina; Eagle Roller Mills Company, Shelby, North Carolina; Carolina Milling Company, Laurene, South Carolina; W. A. Davis, Highpoint, North Carolina; and Farmers Exchange Cooperative with two plants located at Lumberton, North Carolina and Columbia, South Carolina. I have been advised by most of these companies and by grain brokers through whom they purchase, that if the multi-car rates go into effect on August 7, 1962, they will immediately abandon purchases of barge-rail grain from me and will rely on the much cheaper multi-car rates.

At Guntersville, Alabama I own a shelling plant, grain dryer, an elevator, rail siding and dock facilities with a marine leg for unloading barges. My elevator and related facilities had a reasonable value of $500,000.00 before the Southern Railway proposed the multi-car rates now under investigation. I had received a bona fide offer to purchase those facilities at that figure. The mere proposal of these rates posed a threat to my continued ability to merchandise [fol. 62] barge grain throughout the Southeast and caused the withdrawal of that offer. The value of my business was reduced by at least 50%. If these proposed rates go into effect and remain in effect for a period of six months, my entire business will be virtually worthless and I will be compelled to close my doors.

The following will illustrate the adverse effect these rates will have on my business.

The proposed multi-car rate from St. Louis to Birmingham is $3.12 per ton, a reduction of $5.58 from the present rate of $8.70. The barge-rail combination from St. Louis to the same destination is $5.48 per ton and the barge-truck combination from St. Louis to Birmingham is $5.07. Obviously no grain buyer at Birmingham can pay a $1.95 premium to buy barge grain from me.

The multi-car rate from St. Louis to Spartanburg, South Carolina is $4.60 per ton, a reduction from the present rate of $11.30. The barge-rail combination from St. Louis to Spartanburg via Guntersville is $9.08 per ton. Again my customers at Spartanburg would be required to pay $4.48 per ton premium in order to continue to do business with me.

The multi-car rate from St. Louis to Augusta, Georgia will be $5.14 per ton, a reduction from the present rate of $11.70. The barge-rail combination from St. Louis to Augusta via Guntersville is $7.88 per ton. My customers at Augusta cannot afford to pay the $2.74 per ton premium which would be necessary in order for them to continue doing business with me.

[fol. 63] The same situation prevails with respect to grain from Evansville to the same destinations. In the case of my customers at Birmingham, they would be required to pay a premium of $2.12 per ton in order to buy grain from me on the lowest combination of barge-truck from Evansville to Birmingham. The premium for barge-rail grain at Spartanburg would be $5.03 and the premium at Augusta would be $3.31 per ton.

These illustrations should be sufficient to establish the immediate and devastating effect that the proposed rates will have upon my business at Guntersville.

My records show that thus far in 1962 I have shipped almost one million bushels of grain from my elevator at Guntersville to purchasers in the Southeast who are presently equipped to receive, unload and store multi-car shipments. This represents about 30% of my total sales for the year. The percentage is less than last year because the threat of the multi-car rates has discouraged purchases. If the proposed rates go into effect on August 7, each of these purchasers will be able to purchase grain at the gateways and ship it all-rail to their plants at a tremendous saving in transportation charges. The result will be that immediately after August 7 my total sales volume will drop dramatically, and my barge-rail shipments will dwindle to nothing. In fact, my customers who buy barge-rail grain have cut back their purchases in anticipation of the multi-car rates. Our sales of grain for barge-rail delivery already have dropped by 75%. Those customers are letting their storage bins go empty so they can begin using the multi-car rates on August 7. The damage to me will be immediate, great and irreparable.

[fol. 64] None of the grain which I purchase is consumed locally in Guntersville. All of it is transported from Guntersville to interior points. Guntersville is not a major grain consuming point. My rail facilities at Guntersville are not adequate to permit me to receive, store and unload multi-car shipments. Even if I were so equipped, I could not make use of the rates because the transportation charge beyond Guntersville to the areas of consumption would make me non-competitive with grain shipped directly to those same destinations on multi-car rates.

O. J. Walls

Subscribed and sworn to before me, a Notary Public, on this the 24 day of July, 1962. Joe Starnes, Jr., Notary Public. My commission expires: 22 March 1966.

[File endorsement omitted]

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION OF SOUTHERN RAILWAY COMPANY TO DISMISS—Filed August 1, 1962

Defendant Southern Railway Company, a corporation, hereby moves to dismiss the action on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.

2. The court is without jurisdiction of the subject matter.

3. The court is without jurisdiction to grant the relief sought in the complaint.

Southern Railway Company, Defendant, By: Jos. F. Johnston, Leigh M. Clark, Maxwell Alston, 9th Floor, First National Building, Birmingham 3, [fol. 66] Alabama; William D. McLean, James L. Tapley, William P. Stallsmith, Jr., Southern Railway System, P. O. Box 1808, Washington 13, D. C.

Certificate of Service

I hereby certify that a copy of the foregoing Motion to Dismiss has been served on plaintiffs' attorneys, this .... day of ...., 1962.

.................................., Of Counsel for Defendant, Southern Railway Company.

[fol. 67] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

ANSWER OF SOUTHERN RAILWAY COMPANY TO COMPLAINT—Filed August 1, 1962

First Defense

The complaint fails to state a claim against defendants, including Southern Railway Company, upon which relief can be granted.

Second Defense

Defendant, Southern Railway Company, denies the allegations of Paragraphs I, VII, IX, X, XI, XII, XIII and XIV of the complaint. There is no Paragraph VIII in the complaint.

Defendant admits the allegations in sub-paragraphs numbered 1 through 8 of *Paragraph II*, and denies the remaining allegations of *Paragraph II*.

[fol. 68] Defendant admits the allegations of sub-paragraphs (a) through (c) of *Paragraph III*, the first sentence of sub-paragraph (d), sub-paragraph (e), and denies the remaining allegations of *paragraph III*.

Defendant admits the allegations of the first and third sentences of *paragraph IV*, and denies the remaining allegations, as constituting erroneous characterizations as well as being conclusions of law.

Defendant admits the allegations in the first three sentences of *Paragraph V*, and denies the remaining allegations therein. Defendant further states, as set forth in the affidavit of James L. Tapley, Esquire, attac and made part hereof, that protesting parties by their own actions reflected in the excessive length of presentation of their evidence as well as the manner of such presentation, and the extremely protracted and unduly time consuming cross-examination of defendant's witnesses, have directly caused the magnitude of the record in I. & S. No. 7656 and the fact that the case is still in hearing before the Examiner. Continuation of such methods by the protesting parties, and in particular continuation of protracted and unduly time consuming cross-examination of defendant's witnesses, will delay by protestants' own acts completion of the hearing until some date still to be determined.

Defendant admits the allegations of *Paragraph VI* and further states that Southern Railway Company, the public, including shippers of grain to and receivers of grain in the Southeastern states of Alabama, Georgia, Florida, Tennessee, Kentucky, North Carolina and South Carolina have been deprived of the benefit of Southern's multiple car rates and the service thereunder for approximately twelve full months. As set forth in the affidavit of Robert S. Hamilton, attached hereto and made part hereof, defendant's rates will produce revenues substantially in excess of out-of-pocket costs, and have as their primary purpose to enable Southern to meet the competition of unregulated [fol. 69] long-haul truck transportation of grain into the aforesaid Southeastern states, such unregulated truck transportation constituting by far the major individual portion of the grain movement into the Southeast. Southern's multiple car rates on grain, now before the Interstate Commerce Commission in its Docket I. & S. No. 7656, entitled *Grain in Multiple Car Shipments—River Crossings to the South*, have been made possible by substantial technological advances on the part of defendant, Southern, both in railroad equipment and in the art of railroad transportation. Southern is seeking to pass the benefits of such technological advances on to the public, including shippers of grain to and receivers of grain in the aforesaid Southeastern states, through the medium of the instant multiple car grain rates. The public interest in the availability of these multiple car rates far outweighs the unsubstantiated and exaggerated claims of prospective injury advanced by the plaintiffs herein. The affidavit of Robert S. Hamilton, attached hereto, further indicates that Southern's multiple car rates have received the strong support of receivers of grain throughout the aforesaid Southeastern states, as well as the Southern Governors' Conference, the Association of Southeastern Utilities Commissioners, the United States Department of Agriculture, etc. Southern's multiple car rates will promote vigorous competition between long haul transportation of grain by unregulated truck and by railroad into the Southeast, with barge transportation continuing to supply a significant portion of the grain to be transported to the Southeast (a) for movement beyond destination ports, or (b) for processing into products of grain such as soybean meal, animal and poultry feeds, and flour and subsequent distribution thereof. No mode of transportation, whether truck, rail or barge, will have anything even remotely resembling a monopoly of the grain movement into the aforesaid Southeastern states.

[fol. 70]

Third Defense

The multiple car rates of defendant, Southern Railway Company, are before the Interstate Commerce Commission in its Docket I. & S. No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South*, and are under the Commission's regulation, supervision and other jurisdiction. By virtue of the explicit, unequivocal language of the provisions of Section 16 of the Clayton Act, 15 U.S.C. 26, the instant action brought by plaintiffs does not lie and is null and void.

Fourth Defense

Plaintiffs are among the protesting parties actively participating in the hearings before Examiner W. W. Peck of the Interstate Commerce Commission in its Docket I. & S. No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South*. As set forth in the affidavit of James L. Tapley, Esquire, attached hereto and made part hereof, and earlier discussed in the Second Defense, *supra*, page two, by their own actions in the extreme length of presentation of their evidence, as well as the manner of such presentation, the unduly time consuming cross-examination of defendant's witnesses, etc., the protesting parties by their own acts have prevented the completion of hearings and submission of the case to the Interstate Commerce Commission for its decision. Contrary to well-established principles of equity and equity procedure, these protesting parties are here seeking to exploit the judicial process in reliance upon present circumstances and conditions in the aforesaid Interstate Commerce Commission Docket I. & S. No. 7656 which they and their associated protesting parties have themselves directly brought about. For this additional substantial reason plaintiffs' action does not present any valid basis for equitable relief and is null and void.

[fol. 71]

Fifth Defense

Under date of March 23, 1962 several protesting parties, including two of the instant plaintiffs, Arrow Transportation Company and City of Guntersville, presented a motion to the Interstate Commerce Commission for an order requiring cancellation of the multiple car grain rates of defendants, including Southern Railway Company, on the ultimate grounds that said rates were unlawful. This motion had followed submission of the direct case of the defendants, including Southern Railway Company. The protesting parties' motion, following submission of replies by defendants, was denied by the entire Interstate Commerce Commission under date of May 4, 1962. The Interstate Commerce Commission continues to retain supervision, regulation and jurisdiction of defendants' multiple car rates on grain to the Southeast in the aforesaid Docket I. & S. No. 7656. Plaintiffs, notwithstanding the foregoing, by their complaint as private parties here seek, by injunction and/or temporary restraining order to interfere with the business and transaction of defendant interstate rail carriers of sufficient public significance and importance to be within the jurisdiction of the Interstate Commerce Commission. Their complaint does not present a proper case for the exercise of the equity powers of this Honorable Court, and is null and void.

Wherefore, defendant, Southern Railway Company prays that this Honorable Court dismiss the complaint for preliminary injunction and/or temporary restraining order and/or other relief.

Dated at Birmingham, Alabama this 30th day of July, 1962.

Southern Railway Company, Defendant, By: Joseph F. Johnston, Cabaniss & Johnston, First National Bank Building, Birmingham 3, Alabama; William D. McLean, James L. Tapley, William P. Stall- [fol. 72] smith, Jr., Attorneys, 15th & K Streets, N. W., Washington 13, D. C., Attorneys for Southern Railway Company, Defendant.

Duly sworn to by William D. McLean, jurat omitted in printing.

[fol. 73] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10,224

[Title omitted]

MEMORANDUM—August 2, 1962

During the afternoon of Friday, July 27th, last, Judge Grooms and attorneys representing plaintiffs in this case discussed same with me briefly. It was explained to me that this case was one of great and vital importance to all parties concerned, that time was of the essence. Due to the fact that Judge Lynne was on vacation and that Judge Grooms had scheduled his vacation to begin August 1st. the purpose of this conference was to see if my August docket, which is unusually heavy with work, could be interrupted and rescheduled so that an early hearing could be set on motions for preliminary injunction or other relief. At that time I found the earliest date available on my calendar to be [fol. 74] August 13th and agreed to set aside my planned work for that day so that this matter might be heard, if necessary.

A complaint was filed by plaintiffs on July 27th. On August 1st a motion for preliminary injunction was filed. Answer together with motion to dismiss was filed on August 1st by defendants.

On the morning of July 30th a conference was arranged in chambers attended by attorneys representing plaintiffs, and by attorneys representing the Southern Railroad, one of the defendants in this case. In a general discussion it was agreed that due to the expiration of the suspension of the proposed rates pursuant to Title 49, U.S.C., Section 15(7) of the Interstate Commerce Act, an early hearing was most important and necessary. It was then agreed that the Court would set aside its schedule for August 1st and set this case together with all motions on that date.

Another conference was held in chambers during the afternoon of July 31st, called by counsel for plaintiffs, for the purpose of advising the Court that proper service had not been obtained on all defendants and to request that the hearing be reset for August 13th. The defendants being represented at the conference, it was agreed that due to the close time element trial would be had as originally planned on August 1st.

After some discussion I indicated to counsel for plaintiffs that I seriously doubted that this Court has jurisdiction of the subject matter and that at that time, without [fol. 75] having had time to properly research the question and with only a bare outline of the facts involved in the case, I was not convinced that the Court should grant the injunctive relief sought.

In the brief time allowed I have been unable to find authority that would remove the doubt as to jurisdiction from my mind. The cases so ably cited by counsel for plaintiffs in briefs and in brilliant oral arguments do not help. To me there are some important factors contained in those cases not found in this case. While the opinion of Judge Lynne, and I know of no Judge whose opinion would have more weight with me, would be most helpful as to the subject matter in this case should the Court have jurisdiction, his opinion in *Arrow Transportation Company v. United States of America and others*, 176 Fed. Supp. 411, does not help me on the question of jurisdiction in this case. This is true of the other cases cited by plaintiffs.

Defendants, relying strongly on *The Great Northern Railway Company* case, 281 U. S. Reports 412, have also failed to offer authority that completely satisfies the Court on the question of jurisdiction in this case. Arguments of counsel, however, together with the Court's research have continued and increased the Court's doubt as to jurisdiction.

Since hearing the oral arguments in this case presented brilliantly by learned counsel and after diligent research and as thorough study of briefs as time would allow, I have come to the conclusion, and it is my judgment, that this Court does not at this time have jurisdiction of the subject matter and is without jurisdiction to grant the relief sought in the complaint.

[fol. 76] At the same time I am of the opinion that there may be grave danger that irreparable injury loss or damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in conference strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.

I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 49, Section 8, of the Interstate Commerce Act. Once the Commission renders a decision in the case the parties have adequate and well-defined remedies at law; therefore, I have convinced myself that should this Court have jurisdiction of this matter, it should consider all of these matters most carefully and deliberately before denying injunctive relief to plaintiffs. At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion [fol. 77] for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case.

The Court requests counsel for defendants to submit findings of fact, conclusions of law and order at the earliest possible date.

Dated this the 2nd day of August, 1962.

C. W. Allgood, United States District Judge.

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10,224

[Title omitted]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER—August 3, 1962

This cause came on to be heard on August 4, 1962, on motion and prayer of plaintiffs for a preliminary injunction. Defendant Southern Railway Company having filed motion to dismiss and answer appeared by counsel. Defendant Louisville & Nashville Railroad Company appeared by counsel and waived prior service of the complaint and notice of the time of hearing. Defendants St. Louis-San Francisco Railway Company and Seaboard Air Line Railroad Company appeared by counsel and waived service and notice of hearing. The Tennessee Valley Authority appeared by its General Counsel as *amicus curiae* in support of plaintiffs' motion.

The application was heard on the verified complaint and answer and on affidavits filed on behalf of plaintiffs and of defendant Southern Railway Company and on arguments of counsel. The court handed down its memorandum at 2:00 P.M., on August 2, 1962.

[fol. 79] The court makes the following findings of fact:

1. Plaintiffs and defendants are parties to a proceeding now pending before the Interstate Commerce Commission entitled Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South.* Plaintiffs seek in this court to maintain the status quo pending a final Commission decision on the merits in that proceeding.

2. The averments contained in paragraph II-A of the complaint are true.

3. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

4. The averments in paragraph III (a), (b), (c) and (e) of the complaint are true, and the averments in the first sentence of paragraph III (d) are true. The City of Guntersville is interested in this action for the reason that it believes that its grain industry is in great jeopardy in the event the tariff schedules under investigation by the Commission in I. & S. Docket 7656 became effective, and believes that same will endanger the prosperity, welfare and common good of its citizens.

5. During the year 1961 the defendants published tariff schedules proposing to reduce their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the southeast, which rates, according to the verified complaint filed as an affidavit herein and other affidavits filed herein, will be substantially lower than existing rates.

[fol. 80] 6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .", and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.

7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to extend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.

8. The tariff schedules published by the defendants which are currently under investigation by the Commission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a court of competent jurisdiction.

[fol. 81] 9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

Conclusions of Law

1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Com- [fol. 82] mission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

Wherefore, it is hereby Ordered:

1. That the motion for a preliminary injunction and a temporary restraining order be and the same is hereby denied.

2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied.

This 3rd day of August, 1962.

C. W. Allgood, United States Judge.

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION FOR A TEMPORARY INJUNCTION DURING THE PENDENCY OF THIS APPEAL—Filed August 3, 1962

Come the Plaintiffs in the above-styled cause, and pursuant to the provisions of Rule 62(c) of the Federal Rules of Civil Procedure, move this Honorable Court to grant an injunction during the pendency of the appeal to the Circuit Court of Appeals, for the Fifth Circuit, upon such terms as to bond, or otherwise, as it considers proper for the security of the rights of the Plaintiffs in order that the status quo with respect to the proposed tariff schedules published by the Defendants, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, be maintained until the [fol. 84] determination of the appeal by the Circuit Court of Appeals.

The administrative decree of the Commission, as well as the decision of the Circuit Court of Appeals, will be rendered ineffective and the Plaintiffs will sustain immediate and irreparable injury, loss and damage, unless, pending final decision by the Court of Appeals, the Defendants are prevented by a Stay Order of this Court from placing said tariff schedules into effect.

Sirote, Permutt, Friend & Friedman, By Morris K. Sirote; Lovett & Lovett, By John C. Lovett; Joe Starnes, Jr., City Attorney of Guntersville, Alabama, Attorney for City of Guntersville, Attorneys for Plaintiffs.

Duly sworn to by Morris K. Sirote, jurat omitted in

[fol. 85] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

ORDER DENYING STAY ORDER PENDING APPEAL—August 3, 1962

This matter coming on to be heard upon the application by the Plaintiffs for a Stay Order pending appeal, pursuant to the provisions of Rule 62 (c) of the Federal Rules of Civil Procedure, and the Court having considered the same, the Court finds that, for the reasons set out in the Order denying the Plaintiffs' application for a temporary injunction this day entered in this cause, the Court is without power or jurisdiction to exercise discretion to grant the relief prayed for in this Motion, and that the same should be denied.

It is, therefore, by the Court, Ordered that the application for a Stay Order pending appeal before the Circuit Court of Appeals be, and the same is hereby denied.

(2) This Order shall be without prejudice, however, to the right of the Plaintiffs to make a similar application for relief before the Court of Appeals, pursuant to the provisions of Rule 62 (g) of the Federal Rules of Civil Procedure.

Done and Ordered this 3rd day of August, 1962.

C. W. Allgood, District Judge.

[fol. 86] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

NOTICE OF APPEAL—Filed August 3, 1962

Notice is hereby given that plaintiffs, Arrow Transportation Company, a corporation, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., a corporation, and City of Guntersville, Alabama, a municipal corporation, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order of the Honorable Clarence Allgood, Judge of the United States District Court for the Northern District of Alabama, Southern Division, denying plaintiffs' application for a preliminary injunction, entered in this action on August 3, 1962.

Arrow Transportation Company, a corporation; O. J. Walls d/b/a O. J. Walls Company and John D. Bagwell Farms & Hatchery, Inc., a corporation; By: Morris K. Sirote, of Sirote, Permutt, Friend & Friedman, By: John C. Lovett, of Lovett & Lovett, Attorneys for plaintiffs;

City of Guntersville, Alabama, a municipal corporation, By: Joe Starnes, Jr., Attorney for City of Guntersville.

[fol. 87] Acknowledgment of Service (omitted in printing).

[fol. 88] [File endorsement omitted]

In the United States District Court
For the Northern District of Alabama
Southern Division

Civil Action No. 10224

[Title omitted]

Bond for Costs of Appeal—Filed August 3, 1962

We the undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to defendants, Southern Railway Company, a corporation, Louisville & Nashville Railroad Company, a corporation, St. Louis-San Francisco Railway Company, a corporation, and Seaboard Airline Railroad Company, a corporation, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas plaintiffs have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed August 3, 1962, from the judgment of this Court entered August 3, 1962. If the plaintiffs shall pay all costs adjudged against them if the appeal is [fol. 89] dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Arrow Transportation Company, By H. G. King, Its President, Plaintiff,
Morris K. Sirote, John C. Lovett, Sureties.

Signed and acknowledged before me this 3rd day of August, 1962. Mary L. Tortorici, Chief Deputy Clerk, U. S. Dist. Court.

[fol. 90] Designation of Contents of Record on Appeal —Filed August 3, 1962 (omitted in printing).

[fol. 90a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 91]
[Handwritten notation—Filed Aug. 3, 1962, Walter P. Gewin, U. S. Circuit Judge]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Appellants,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Appellees.

MOTION FOR AN INJUNCTION TO PRESERVE THE STATUS QUO PENDING APPEAL

To the Honorable Judges of Said Court:

Come now the Appellants in the above styled cause and move this Honorable Court as follows:

1. To enter a temporary restraining order to maintain the status quo, restraining and enjoining the Appellees from applying to the rail transportation of grain the tariff schedules published by them, as hereinafter more fully described, said temporary restraining order to remain in effect until the hearing and determination of Appellants' application for an injunction to preserve and maintain the said status quo by a Three-Judge Panel of this Court to be convened at Montgomery, Alabama, on August 8, 1962.

[fol. 92] 2. That upon the hearing of Appellants' application for a temporary injunction before said Three-Judge Panel, that the Court enter a temporary injunction to preserve and maintain the status quo, enjoining and restraining the Appellees from applying to the rail transportation of grain the said tariff schedules published by them, said injunction to remain in effect pending this appeal and until the entry by this Court of a final order relating thereto.

3. The grounds in support of this motion are as follows:

(a) Appellees published certain rates and charges on the transportation of grain from certain Ohio and Mississippi river ports to specified destinations in the Southeast. The rates are under investigation by the Interstate Commerce Commission in Docket No. I & S 7656—*Grain in Multiple Car Shipments, River Crossings to the South,* pursuant to an investigation and hearings undertaken by it under an order finding that

> "there is reason to believe that they (the proposed rates) would, if permitted to become effective, result in rates and charges, rules and regulations or practices which would be unjust or unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and competitive practices in contravention of the National Transportation Policy."

(b) Pursuant to the order and findings above set out, the Interstate Commerce Commission suspended such proposed rates for seven (7) months, or until March 9, 1962, in accordance with the provisions of Title 49 U.S.C., Sec. 15(7) of the Interstate Commerce Act, which provides that the Commission may suspend proposed rates for not longer than seven (7) months, beyond the time they would otherwise go into effect.

[fol. 93] (c) Appellants further allege that it has been the custom and practice on the part of common carriers, whose proposed rates are under investigation by the Interstate Commerce Commission to voluntarily extend the effectiveness of such rates beyond the seven months' period, while such investigation is still in progress, and pending the ultimate determination by the Commission of the lawfulness thereof. In accordance with such practice and custom, as well as because of certain delays in the hearings by the Commission brought about at the instance and request of the Appellees, the Appellees voluntarily extended the effective date of the proposed rates from March 9, 1962, to August 7, 1962. The Appellees have, however, declined to further extend the effective date of such rates beyond August 7, 1962, both upon request of the Appellants, as well as upon the strong recommendation of the learned Court below, as will be hereafter shown.

(d) On, to-wit, July 27, 1962, Appellants filed their verified Bill of Complaint in the Court below whereby the Appellants sought equitable relief to maintain the status quo as to said rates, until the Commission shall have completed its investigation and rendered a decision as to their lawfulness. Appellants sought no relief in the Court below, and do not now seek any relief here, which would in any way interfere with the pending investigation before the Commission, or which would involve any decision of the lawfulness of said rates, all of which is within the exclusive jurisdiction of the Commission. They seek solely to maintain the status quo in an area where the Commission is powerless to grant relief, in order to prevent immediate, substantial and irreparable injury and damage to the Ap-[fol. 94] pellants, as will be hereinafter more fully set out. This is in accordance with the well established rule that a court of equity will intervene by way of a temporary injunction as an aid in the administrative process in advance of final administrative action.

4. Jurisdiction of the suit below was founded on (1) diversity of citizenship and amount, (2) the existence of a federal question and amount in controversy arising under the Constitution and laws of the United States by virtue of Title 28 U.S.C. Section 1331, and (3) on the existence of a federal question arising under particular statutes, Title 28 U.S.C. 1337, giving district courts original jurisdiction under statutes regulating commerce, and Title 15 U.S.C.

Section 26, relating to injunctive relief from anti-trust violations.

5. On, to-wit, August 1, 1962, Appellants moved the Court for an order granting Appellants a preliminary injunction. enjoining the Appellees from applying said tariff schedules so published by them, until the entry by the Interstate Commerce Commission of a final order relating thereto. On August 2, 1962, the Court below, after hearing, upon due notice to the Appellees, entered a memorandum opinion and order, recognizing that Appellants were entitled to equitable relief to avoid great irreparable harm and damage, but denied Appellants' application for a temporary injunction on the sole ground that the Court, in its opinion, was powerless to act for lack of jurisdiction of the subject matter. A true and correct copy of the memorandum opinion of the Court below is attached hereto as Exhibit "A".

[fol. 95] 6. The ruling of the Court below is erroneous and is contrary to clearly established principles of law found in numerous decisions of the Federal Courts, as set out in the Brief and Argument filed by Appellants in support of this motion, and there is more than strong probability that Appellants will prevail both before the Commission and on this appeal.

7. Appellants have applied for relief to the Court below under the provisions of Rule 62(c) of the Federal Rules of Civil Procedure, for an injunction maintaining the status quo during the pendency of the appeal, but the Court below erroneously assumed that it had no discretion to grant such relief and denied the same on the sole ground that it lacked jurisdiction to act in the premises, without prejudice, however, to the right of the Appellants to seek this relief here.

8. The administrative decree of the Interstate Commerce Commission, as well as the judgment of this Court on this appeal, will be rendered ineffective, and the Appellants will sustain immediate, substantial and irreparable injury and damages, for which Appellants have no adequate rem-

edy at law, unless, pending final decision of this appeal, the injunctive relief prayed for is granted by this Honorable Court, all as more fully appears in the record of the proceedings below.

Sirote, Permutt, Friend & Friedman, By Morris K. Sirote; Lovett & Lovett, By John C. Lovett; Joe Starnes, Jr., City Attorney of Guntersville, Alabama, Attorneys for Appellants.

[fol. 96] *Duly sworn to by John C. Lovett, jurat omitted in printing.*

[fol. 97]

Exhibit "A" to Motion

Memorandum opinion of Judge C. W. Allgood, dated August 2, 1962 omitted. Printed on page 52, side folio 73 ante.

[fol. 101]

In the United States Court of Appeals For the Fifth Circuit

19928

[Title omitted]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk.]

Temporary Restraining Order—Dated August 3, 1962

This cause coming on to be heard on the motion of the plaintiffs-appellants for a temporary restraininng order; and due notice having been given to the defendants-appellees and all parties having been represented by counsel present in court who presented arguments for the respective parties and the Court having before it and having considered the record in the cause and having considered the arguments of counsel, portions of the record in the proceedings before the United States District Court for the Northern District of Alabama, Southern Division, and being fully advised in the premises and of the equities involved, it finds that the District Court concluded that it was without jurisdiction in the premises and that the District Court further found:

> [fol. 102] "At the same time I am of the opinion that there may be grave danger that irreparable injury loss ~~or~~ damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in conference strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.
>
> "I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 59, Section 8, of the Interstate Commerce Act."

It appears to this Court from the record that the defendants-appellees are about to apply to rail transportation of grain the tariff schedules published by them which are currently under investigation by the Interstate Commerce Commission, Docket No. I & S 7656—*Grain in Multiple Car Shipments—River Crossings to the South,* which will cause immediate irreparable injury, loss and damage to the plaintiffs-appellants in that the plaintiffs-appellants will lose very substantial amounts of freight traffic and will be irretrievably deprived of substantial freight revenues; and an appeal having been taken by the plaintiffs-appellants to the United States Court of Appeals for the Fifth Circuit from the order, judgment and decree of the United States District Court for the Northern District of Alabama, Southern Division:

Now, Therefore, it is hereby Ordered and Decreed:

1. That pending further order of this Court, each and all of the defendants-appellees, their respective officers, agents, servants, representatives, employees, attorneys and successors and all other persons in active concert or participation with them be, and they hereby are temporarily restrained and enjoined from directly or indirectly applying to the rail transportation of grain the tariff schedules [fol. 103] published by them which are currently under investigation by the Interstate Commerce Commission in Docket No. I & S 7656—*Grain in Multiple Car Shipments —River Crossings to the South*, until 11 o'clock a.m. on Wednesday, August 8, 1962, and for such period of time thereafter as may be required by a panel of this Court to hear, determine and pass upon the motion of the plaintiffs-appellants for a temporary restraining order.

2. The plaintiffs-appellants are ordered and directed to file their bond, together with corporate surety, to be approved by the Court, in the sum of $10,000.00, conditioned for the payment of such costs, expenses and damages as may be incurred or suffered by any of the defendants-appellees herein, in giving notice and information of this order, but not including loss of revenue resulting from the issuance of this order.

3. Said motion is set for hearing before a panel of this Court in the Courtroom of the United States Court of Appeals for the Fifth Circuit, Montgomery, Alabama, at 11 o'clock a.m. on Wednesday, the 8th day of August, 1962.

4. Said hearing shall be upon the record certified upon appeal from the District Court of the United States for the Northern District of Alabama, Southern Division, and upon typed briefs, at least four legible copies to be filed.

Done at Tuscaloosa, Alabama, at 6:40 p.m. this the 3rd day of August, 1962,

Walter P. Gewin, United States Circuit Judge.

Filed Aug. 3, 1962
Walter P. Gewin, U. S. Circuit Judge

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk.]

BOND FOR TEMPORARY RESTRAINING ORDER

Whereas, Appellants have applied to this Court for a temporary restraining order against the Appellees, enjoining and restraining them from the commission of certain acts as in the application therefor more particularly described;

Now Therefore, the undersigned, Arrow Transportation Company, a corporation of the State of Illinois having its principal office and place of business in Sheffield, Alabama, Principal, and

Fidelity and Casualty Company of New York

as Surety, in consideration of the premises and of the issuing of a temporary restraining order, does hereby undertake in the sum of of Ten Thousand Dollars ($10,000.00) and promise that if a temporary restraining order shall [fol. 105] issue, the Appellants will pay to the parties enjoined such damages, not exceeding the sum of Ten Thousand Dollars ($10,000.00), as they may sustain by reason of the temporary restraining order, if the Court finally decides that the Appellants were not entitled thereto.

In Witness Whereof, the Principal and Surety have caused this undertaking to be signed by its duly authorized officers at Tuscaloosa, Ala., this 3rd day of August, 1962.

Arrow Transportation Company, a corporation, By: Howard G. King, Its President; Fidelity and Casualty Company of New York, By: Louise B. Noland, Its: Attorney in Fact.

(Seal)

The foregoing bond is hereby approved this 3 day of August, 1962.

Walter P. Gewin, Circuit Judge.

Filed Aug. 3, 1962
Walter P. Gewin, U. S. Circuit Judge.

[fol. 106]

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That the FIDELITY AND CASUALTY COMPANY OF NEW YORK has made, constituted, and appointed, and by these presents does make, constitute, and appoint

Louise B. Noland of Tuscaloosa, Alabama

its true and lawful attorney for it and in its name, place and stead to execute on behalf of the said Company, as surety, bonds, undertakings and contracts of suretyship to be given to

all obligees

provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of FIFTY THOUSAND ($50,000) DOLLARS.

This Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK at a meeting duly called and held on the 16th day of October, 1957:

> "RESOLVED, that the Chairman of the Board, the President, an Executive Vice President or any Vice President of the Company, be, and that each or any of them hereby is, authorized to execute Powers of Attorney qualifying the attorney named in the given Power of Attorney to execute in behalf of THE FIDELITY

AND CASUALTY COMPANY OF NEW YORK, bonds, undertakings and all contracts of suretyship; and that any Secretary or any Assistant Secretary be, and that each or any of them hereby is, authorized to attest the execution of any such Power of Attorney, and to attach thereto the seal of the Company.

FURTHER RESOLVED, that the signatures of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed and in the future with respect to any bond, undertaking or contract of suretyship to which it is attached."

In Witness Whereof THE FIDELITY AND CASUALTY COMPANY OF NEW YORK has caused its official seal to be hereunto affixed, and these presents to be signed by one of its Vice Presidents and attested by one of its Secretaries this 31st day of March, 1959.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK

By /s/ CARROLL R. YOUNG
Vice-President

Attest:

/s/ F. J. MILLER
Secretary

(Corporate Seal)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 31st day of March, 1959, before me personally came Carroll R. Young, to me known, who being by me duly sworn, did depose and say: that he resides in Berkeley Heights in the County of Union, State of New Jersey, at 23 Ridge Drive East; that he is a Vice-President of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

/s/ Robert J. Mettalia

Robert J. Mettalia
Notary Public—State of New York
No. 41-2675700
Qualified in Queens County
Certificate Filed in New York County
Term Expires March 30, 1961

(Notary Seal)

Certificate

State of New York, }
County of New York, } ss.:

I, the undersigned, a Secretary of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New York corporation, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney, is now in force.

Signed and sealed at the City of New York. Dated the 3rd day of August, 1962.

/s/ F. J. Miller
Secretary

(Corporate Seal)

Bond 4315A

[fol. 107] [File endorsement omitted]

[fol. 108]

In the United States Court of Appeals For the Fifth Circuit

No. 19928

Arrow Transportation Company, a corporation, O. J. Walls, D/B/A O. J. Walls Company, John D. Bagwell Farms & Hatchery, a corporation, City of Guntersville, Alabama, a municipal corporation, Appellants,

vs.

Southern Railway Company, a corporation, Louisville & Nashville Railroad Company, a corporation, St. Louis-San Francisco Railway Company, a corporation, Seaboard Airline Railroad Company, a corporation, Appellees.

Memorandum of Appellants in Support of Motion for a Preliminary Injunction—Filed August 8, 1962

Sirote, Permutt, Friend & Friedman
and
Morris K. Sirote
First Federal Building
Birmingham 3, Alabama

John C. Lovett
Benton, Kentucky

Joe Starnes, Jr.
Guntersville, Alabama

[fol. 109]

Preface

This action is before this Court on Appellants' motion for a preliminary injunction to preserve the status quo of the parties until the Court can hear and determine Appellants' appeal from an order of the United States District Court for the Northern District of Alabama, Southern Division. A temporary restraining order was entered by Judge Walter P. Gewin on August 3, 1962, to preserve the status quo until 11:00 A.M. on August 8, and such time thereafter as may be required for the Court to pass upon Appellants' motion for a preliminary injunction.

Statement of the Facts

This case represents another chapter in the history of the barge lines' struggle to survive as common carriers on the Tennessee River. See *Arrow Transportation Co., et al.* vs. *United States* (N.D. Ala. 1959), 176 F.Supp. 411, Affirmed 361 U.S. 353.

During the year 1961, the Appellees published tariff schedules proposing drastic reductions in rail rates on the transportation of grain in multiple car shipments from [fol. 110] certain Ohio and Mississippi River ports to numerous destinations in the southeast (Findings of Fact, Par. 5). The proposed rates apply only to minimum shipments of 450 tons (about 16,000 bu.) and carry a $2.40 per ton minimum. They do not apply to barge grain transshipped from Guntersville, Alabama to those destinations. Guntersville is an important Tennessee River port where large volumes of barge grain are presently unloaded, stored, and transshipped to the southeast (King Supp. Aff.).

The enormity of these reductions is illustrated in the following table in King's supplemental affidavit:

COMPARISON OF ILLUSTRATIVE RATES PRESENT AND PROPOSED

	From St. Louis			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	601	$10.16	$3.86	139	$3.10	None
Birmingham, Ala.	472	8.70	3.12	71	2.20	None
Gainesville, Ga.	654	10.50	4.17	192	3.30	None
Orangeburg, S.C...	847	12.50	5.27	385	6.00	None
	From Evansville			From Guntersville		
Atlanta, Ga.	441	8.30	3.98	139	3.10	None
Birmingham, Ala.	361	7.10	2.67	71	2.20	None
Gainesville, Ga. ..	494	8.90	3.28	192	3.30	None
Orangeburg, S.C...	687	10.90	4.36	385	6.00	None

Barge Rate: St. Louis, Mo. to Guntersville — $2.39
Evansville, Ind. to Guntersville— 2.11
Transfer charge at Guntersville— .89

[fol. 111] The following comparisons are taken from Walls' affidavit:

	From St. Louis			From Guntersville	
To	Present All-Rail	Proposed All-Rail	Present Barge-Rail Via Guntersville	Rail Present	Rail Proposed
Birmingham, Ala...	$ 8.70	$3.12	$5.48	$2.20	No Change
Spartanburg, S.C...	11.30	4.60	9.08	5.80	No Change
Augusta, Ga.	11.70	5.14	7.88	4.60	No Change

Barge Rate: St. Louis to Guntersville— $2.39
Transfer Charge, Barge to Rail Car — .89

Complaint was made to the Interstate Commerce Commission which found that there was reason to believe that the rates may be unlawful and ordered them suspended for the maximum statutory period of seven months pending investigation. Because of some delays, the suspension period was voluntarily extended by the railroads to 12:01 A.M. on August 7, 1962. The hearings before the Commission are continuing (Findings, Par. 6, 7, 8). The railroads have refused Appellants' request that they voluntarily extend the suspension period (Findings, Par. 11), and, except for the restraining order entered on August 3 by this Court, the rates would already have been placed into effect by the Appellees.

[fol. 112] Affidavits filed in support of the verified complaint establish that these drastically reduced rates, once they become effective, will divert barge grain traffic from the Tennessee River to the railroads, will deprive Appellant Arrow of 80% of its total revenue, and will force it to surrender its certificate as a common carrier barge line (King Aff. and Supp. Aff.). They will force Appellant O. J. Walls, an independent grain merchant at Guntersville who transships eight million bushels of barge grain to the southeast annually, to close his doors (Walls Aff., P. 2, 3). They will force Appellant John D. Bagwell to invest $150,000.00 in facilities to receive, unload (in 24 hours) and store 16,000 bushel shipments or suffer an intolerable competitive disadvantage as against the national grain companies who are his main competitors in the production of broilers and who already are equipped to handle multiple car rail shipments (Bagwell Aff. p. 1, 2). They will have a "devastating effect" on the economy of Guntersville where are located many grain industries dependent to a large degree upon inbound barge movements of grain (Martin Aff. p. 2).

The Court below found that:

> [fol. 113] "There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law." [Findings, p. 4]

Appellants sought the aid of the equity court below to prevent this irreparable injury. They asked for a preliminary injunction to maintain the status quo until the Commission can complete the hearings and enter a final order adjudicating whether the proposed rates are lawful. Appellee Southern Railway filed a verified answer and a motion to dismiss. The other railroads appeared by counsel but filed no responsive pleadings. Hearing was had on August 1, 1962 by agreement of parties. The Tennessee Valley Authority, on oral motion, was given leave to file its brief as *amicus curiae* and make argument in support of the Appellants' motions (Findings, p. 1).

At 2:00 P.M. on August 2, the Court below handed down its memorandum opinion, and on August 3 entered its Findings of Fact, Conclusions of Law and Order in which it denied Appellants' motion on jurisdictional grounds. The memorandum stated, *inter alia*:

> [fol. 114] "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure the parties conclude the hearings as speedily as possible (Court's Memorandum, p. 4).

Appellants then moved for a temporary injunction during the pendency of the appeal to this Court pursuant to [fol. 111] The following comparisons are taken from Walls' affidavit:

	From St. Louis			From Guntersville	
To	Present All-Rail	Proposed All-Rail	Present Barge-Rail Via Guntersville	Rail Present	Rail Proposed
Birmingham, Ala...	$ 8.70	$3.12	$5.48	$2.20	No Change
Spartanburg, S.C...	11.30	4.60	9.08	5.80	No Change
Augusta, Ga.	11.70	5.14	7.88	4.60	No Change

Barge Rate: St. Louis to Guntersville— $2.39
Transfer Charge, Barge to Rail Car — .89

Complaint was made to the Interstate Commerce Commission which found that there was reason to believe that the rates may be unlawful and ordered them suspended for the maximum statutory period of seven months pending investigation. Because of some delays, the suspension period was voluntarily extended by the railroads to 12:01 A.M. on August 7, 1962. The hearings before the Commission are continuing (Findings, Par. 6, 7, 8). The railroads have refused Appellants' request that they voluntarily extend the suspension period (Findings, Par. 11), and, except for the restraining order entered on August 3 by this Court, the rates would already have been placed into effect by the Appellees.

[fol. 112] Affidavits filed in support of the verified complaint establish that these drastically reduced rates, once they become effective, will divert barge grain traffic from the Tennessee River to the railroads, will deprive Appellant Arrow of 80% of its total revenue, and will force it to surrender its certificate as a common carrier barge line (King Aff. and Supp. Aff.). They will force Appellant O. J. Walls, an independent grain merchant at Guntersville who transships eight million bushels of barge grain to the southeast annually, to close his doors (Walls Aff., P. 2, 3). They will force Appellant John D. Bagwell to invest $150,000.00 in facilities to receive, unload (in 24 hours) and store 16,000 bushel shipments or suffer an intolerable competitive disadvantage as against the national grain companies who are his main competitors in the production of broilers and who already are equipped to handle multiple car rail shipments (Bagwell Aff. p. 1, 2). They will have a "devastating effect" on the economy of Guntersville where are located many grain industries dependent to a large degree upon inbound barge movements of grain (Martin Aff. p. 2).

The Court below found that:

> [fol. 113] "There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law." [Findings, p. 4]

Appellants sought the aid of the equity court below to prevent this irreparable injury. They asked for a preliminary injunction to maintain the status quo until the Commission can complete the hearings and enter a final order adjudicating whether the proposed rates are lawful. Appellee Southern Railway filed a verified answer and a motion to dismiss. The other railroads appeared by counsel but filed no responsive pleadings. Hearing was had on August 1, 1962 by agreement of parties. The Tennessee Valley Authority, on oral motion, was given leave to file its brief as *amicus curiae* and make argument in support of the Appellants' motions (Findings, p. 1).

At 2:00 P.M. on August 2, the Court below handed down its memorandum opinion, and on August 3 entered its Findings of Fact, Conclusions of Law and Order in which it denied Appellants' motion on jurisdictional grounds. The memorandum stated, *inter alia*:

> [fol. 114] "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure the parties conclude the hearings as speedily as possible (Court's Memorandum, p. 4).

Appellants then moved for a temporary injunction during the pendency of the appeal to this Court pursuant to

Rule 62(c) of the Federal Rules of Civil Procedure. The Court below, stating that it was "without power of jurisdiction to exercise discretion to grant the relief," denied the motion without prejudice to Appellants' right to seek similar relief in the Court of Appeals.

This appeal followed. At 2:30 P.M. on August 3, the Honorable Walter P. Gewin, Judge of this Court, conducted a hearing in Tuscaloosa, Alabama, at which all parties were represented by counsel. At 6:40 P.M. he entered a temporary restraining order restraining the Appellees from placing the reduced rates into effect until 11:00 A.M. on August 8, 1962, or for such time thereafter as may be required for a panel of this Court to pass upon Appellants' motion for a preliminary injunction preserving the status quo until the appeal from the Court below can be decided.

[fol. 115]

ARGUMENT

I

This Court Has Power to Maintain the Status Quo Pending an Appeal

This Court possesses broad power to enter such orders as it may deem necessary to preserve the status quo pending this appeal. Rule 62(g) of the Federal Rules of Civil Procedure provides that the Rules "do not limit any power of an appellate court or of a judge thereof or a justice thereof to stay proceedings during the pendency of an appeal . . . or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

The "all-writs" statute [28 U.S.C. Sec. 1651] is the basic source of this power to preserve the status quo. It authorizes all federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This power extends to the restraining of administrative decrees to preserve the status quo pending an appeal from that decree. *Scripps-Howard Radio, Inc.* vs. *Federal Com-*

[fol. 116] *munications Commission*, 316 U.S. 4, 86 L.ed. 1229. It assuredly extends to an original suit in equity to restrain the defendants from committing acts which, unless restrained, will cause irreparable injury to Appellants during the pendency of the appeal. This is an inherent power to prevent the defeat or impairment of the Court's jurisdiction of the appeal.

II

The Court Below Had Jurisdiction to Grant the Temporary Injunction

It is the view of some courts that status quo injunctions should not be issued without some showing by the parties who will suffer irreparable damage that they have a meritorious case on appeal. Therefore, the ultimate question to be decided on appeal will be discussed briefly.

The Court below, without citing authority, held that Section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)] grants to the Interstate Commerce Commission "exclusive authority" to suspend proposed railroad rates, and [fol. 117] that the courts have no authority to enjoin the rates until the entry of a final order by the Commission, at which time jurisdiction vests in the statutory three-judge court [28 U.S.C. 2321, et seq.].

Section 15(7) of the Act reads:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers

> affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make [fol. 118] such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified.[1]

Does this Act of Congress impliedly deprive the federal district court of its inherent equity power to preserve the status quo pending trial in order to prevent irreparable injury? We submit that it does not.

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[1] This was a part of the Mann-Elkins Act, June 18, 1910, 36 Stat. 551. Congress gave little thought to harmful rate *decreases*: Senator Heyburn, on the day before the Senate voted on Section 15(7), expressed his concern:

> "Little or no consideration seems to have been given to the advisability of including decreases in rates under the amendment. . . ." [61 Cong. Rec. 6792, May 24, 1910]. See: Senate Report 355, pp. 8-9, 61st Congress, 2nd Sess. (1910).

[fol. 119]

a. *The Language of Section 15(7) Is Silent on the Subject*

The Act protects shippers adversely affected by *increases* in rates, later found to be unlawful, by requiring the railroads to keep accurate records and make refunds. However, it prescribes no remedies for competing carriers adversely affected by *decreases* in rates which are later found to be unlawful. See Judge Brown's opinion in *Amarillo-Borger Express* vs. *United States*, 138 F.Supp. 411. On this subject the Act is silent.

The intrinsic equity powers of the district courts should not be abrogated or lessened without clear and unmistakable statutory language manifesting that Congressional intent.[2]

[fol. 120] The powers of the equity court to serve the ends of justice are, we submit, too basic and fundamental to be lightly taken away. Some strong statutory language evidencing positive Congressional intent should be required.[3]

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[2] It was said in *Scripps-Howard Radio, Inc.* vs. *Federal Commun. Com.*, 86 L.ed. 1229, 316 U.S. 4:

> "It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. (Citing Cases) . . . [p. 9, 10]
>
> "The search for significance in the silence of Congress is too often the pursuit of a mirage. . . . [p. 11]
>
> "Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard." [p. 15]

[3] Note the strong language in Sec. 7421(a), 1954 Internal Revenue Code: "Except as provided in sections 6212(a) and (c) and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." See: *Enochs* vs. *Williams Packing & Nav. Co., Inc.*, May 28, 1962, —— U.S. ——, 8 L.ed. 2d 292.

b. *Construing the Act as Depriving the Equity Courts of Jurisdiction Will Violate the Due Process Clause*

If the language of Section 15(7) that rates "shall go into effect at the end of such period" is construed to forbid a temporary injunction where, as here, that injunction is Appellants' only remedy to prevent immediate, substantial, and irreparable injury, such construction would be unconstitutional.

It is clear that a business or occupation is property within the protection of due process of law, *Liggett Co.* vs. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* vs. *Corporation Comm'n.*, 278 U.S. 515, 519-20 (1929). That the above cases apply with respect to circumstances confronting the plain- [fol. 121] tiffs here is emphasized in *Pacific Inland Tariff Bureau* vs. *United States*, 129 F.Supp. 472, at 477, where the Court stated:

> "By permitting the railroads to reduce their rates, the Commission has, in effect, required the motor carriers to reduce their rates. To deny the motor carriers the opportunity to have such rates judicially reviewed is indistinguishable in practice from a denial of an opportunity to challenge rates directly imposed upon them."

Statutes are to be construed to avoid constitutional difficulties, and, despite broad language in the statute, courts will generally apply the familiar canon that of two possible constructions, the courts adopt the one which will save and not destroy. The courts should not attribute to Congress an intent to defy the Fifth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.

Due process requires more than an *incomplete hearing.* It requires a decision. The Act should not be construed so as to permit the Appellants to be bankrupted before their rights are adjudicated.

[fol. 122]

c. *Construing the Act as Destroying the Equity Power of the Court to Enjoin Will Produce Unequal Operation Thereof*

It is clear that the Interstate Commerce Commission cannot further suspend the rates. It cannot provide Appellants a remedy because its power is exhausted. It is impotent.

It is also clear that the statute creating the three-judge court provides no remedy. It does not yet have jurisdiction to restrain these rates because there has been no *order* entered by the Commission which is ripe for review.[4] Therefore, the jurisdiction of the three-judge court has not yet vested.

The Act itself provides no remedy for victims of a rate decrease. While persons damaged by *increases* are protected by statute, persons damaged by *decreases* are ignored.

Only the inherent equity powers of the district court provide a remedy to Appellants. If Section 15(7) is inter-[fol. 123] preted as impliedly taking away that remedy, that interpretation will produce an unequal operation of the Act.

"Nothing but unmistakable language will warrant such construction of a statute as will produce unequal operation thereof." *L. B. Wilson, Inc.* vs. *Federal Communications Commission*, 170 F.2d 793, 800 (D.C. Cir. 1948). See also *Shaddock* vs. *Gallagher*, 218 F.2d 428, 429 (6th Cir. 1955); *Adams* vs. *Pitts*, 140 F.Supp. 618, 621 (E.D.S.C. 1956).

Hence, the inherent equity power of the federal district courts is the only remedy available to Appellants. That a temporary injunction be available to prevent irreparable injury from rate reductions, while reparations serve a similar purpose with respect to rate increases, is a fair and impartial construction of Section 15(7) that nothing in its language can be said clearly and specifically to forbid.

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[4] Such a court may "enjoin, set aside, annul or suspend" only an *order* of the Interstate Commerce Commission [28 U.S.C. 2321, et seq.]. Until an order is made, that court has no jurisdiction. *Shannahan* vs. *United States*, 20 F.Supp. 1002 (N.D. Ind. 1937), Aff'd. 303 U.S. 596, 82 L.ed. 1039 (1938).

III

The General Equity Power of a Federal Court to Restrain Rates From Going Into Effect at the End of the Seven Months Period Has Been Invoked in Other Cases

We have found only one case in which a district court has been called upon to restrain a carrier from placing [fol. 124] rate reductions into effect at the end of the seven months period. Evidently few such cases have arisen, perhaps because destructive rate reductions are an innovation; perhaps because "it appears to be the universal practice of all regulated carriers concerned to agree to a continuation of a suspension once issued" (*Amarillo-Borger Express* vs. *United States*, supra, p. 414).

That case is *Pacific Inland Tariff Bureau* vs. *United States* (D.C. Ore. 1955), 129 F.Supp. 472, in which drastic reductions in rail rates on petroleum were suspended seven months by the Interstate Commerce Commission and were scheduled to become effective on December 9, 1953. On June 9, six months prior to the effective date, the case was submitted to the Interstate Commerce Commission on the record, briefs and oral argument. The Commission's decision approving the rates was issued December 4. Plaintiffs telegraphed a petition for reconsideration and a request for a stay to the Commission on December 6. Having failed to receive an answer, plaintiffs applied to the district court for temporary restraining order prohibiting the Commission and the railroads from putting the reduced rates into effect at the end of the suspension period. This was not a statutory three-judge court procedure at this juncture. [fol. 125] The United States was not made a party as is required by that statutory procedure (28 U.S.C. 2322). There had been no *final* order of the Commission which would vest jurisdiction in the three-judge court. The railroads attacked the court's jurisdiction to restrain the railroads from putting the rates into effect.

On final hearing before the three-judge court (after the Commission's order had been finalized by overruling plaintiff's petition for rehearing), the equity jurisdiction of the court to extend the suspension period by injunction was affirmed. This was authorized, said the court, "where there is a showing of immediate and irreparable injury flowing from an inadequacy of the prescribed administrative procedure."[5]

A similar case is *Cantlay & Tanzola vs. United States*, S.D. Cal. 1953, 115 F. Supp. 72, in which the Interstate Commerce Commission decision was issued on January 12, [fol. 126] 1953, only 23 days before the suspension period was to expire. The Interstate Commerce Commission refused to stay its order. Plaintiffs obtained a temporary restraining order in district court enjoining the railroads from putting the rates into effect. The railroad's motion to dissolve was denied and the restraining order remained in force pending hearing before the three-judge court on the application for a preliminary injunction. The court held that judicial intervention to restrain rates, in advance of final administrative action, was warranted by the danger of irreparable injury to plaintiffs. The Court rejected the railroad argument (which is made here also) that " 'the court lacks power . . . when reviewing an order of the Commission, to enjoin the railroads, either temporarily or permanently, from publishing particular proposed rates'; that an injunction such as that embodied in the temporary restraining order entered in this case, so the argument goes, 'amounts to a suspension of the rates; a function which Congress has seen fit to delegate exclusively to the . . . Commission and not to the courts.' "

The Court said:

> "Nowhere does there appear any manifestation of Congressional intent to deprive the district courts of their [fol. 127] inherent equity jurisdiction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action, see United States v. United Mine Workers, supra, 330 U.S. at pages 290-295, 67 S. Ct. 677, 91 L. Ed. 884, or 'in afford-

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[5] The following quote from a modifying opinion of the court in 134 F.Supp. 210, indicates what was in the court's mind:

> "Bluntly stated, we fear that the proposed railroad rates, if approved, will drive the barge lines out of business." [213]

> ing relief which it was the purpose of Congress to ensure', whenever such a course is necessary to the effectiveness of the court's decree. The Chicago Junction Case, supra, 264 U.S. at page 270, 44 S. Ct. at page 321, 68 L. Ed. 667." [p. 83]

Similarly, equity courts have not been hesitant to issue injunctions to preserve the status quo in proceedings before other administrative agencies where threatened irreparable injury warranted such action.

In *Isbrandtsen Co. vs. United States*, 81 F. Supp. 544, a temporary injunction was granted to maintain the status quo pending further proceedings to adjudicate the legality of certain agreements pending before the United States Maritime Commission until such agreements were ruled upon by the Commission in an adversary proceeding. Judge Rifkind wrote:

> "We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto."

In *Pennsylvania Motor Truck Ass'n vs. Port of Philadelphia Marine Term. Ass'n*, 183 F. Supp. 910, a status [fol. 128] quo injunction was granted to restrain the effectiveness of a tariff rule being investigated by the Federal Maritime Board. With respect to the lack of conflict between equity relief and the doctrines of primary jurisdiction and exhaustion of administrative remedies, the Court said, at page 913:

> "At the outset, all parties agree that the jurisdiction to pass upon the *merits* of the basic controversy between the parties lies initially in the Federal Maritime Board, and not this Court . . . In short, it is the defendant's contention that the doctrines of 'primary jurisdiction' and 'exhaustion of administrative remedies' deprive this Court of jurisdiction. The controlling issue in this regard, however, is whether the instant action is of the type which is subject to the above doc-

> trines. Plaintiff seeks, in this action but one type of relief—the maintenance of the status quo. The hub of its plea is that the Federal Maritime Board cannot, or will not, stay the enforcement of the disputed provision of the tariff pending its determination . . . Plaintiff, therefore, seeks the assistance of this Court merely as an aid in the administrative process." See also: *West India Fruit & Steamship Co. vs. Seatrain Lines*, 170 F. 2d 775.

While Congress in Section 15(7) has limited the power of the Commission to suspend rates, it contains no limitation on the power of the court to restrain rates to avoid irreparable injury. According to the recent judicial trend, [fol. 129] no such intent should be read into the Act.[6]

There is substantial text authority for the view that the courts can and should intervene to preserve the status quo protecting those who will be irreparably injured and whose administrative remedies are inadequate.[7]

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[6] See: 49 Columbia Law Review 1128. "The better view thus appears to be that courts of equity, upon request of an appropriate party, do have jurisdiction to provide temporary injunctive relief during the pendency of hearings before an administrative agency, even though the statute setting up the agency does not specifically so provide. This appears to be in accord with the recent judicial trend." *Atlantic Coast Line R. Co.* vs. *Macon Grocery Co.*, 166 Fed. 206 (5th Cir. 1909) (cited by Appellees), was decided before the Mann-Elkins Act was enacted and, while not in point, implies a different view. It reflects the philosophy of a half-century ago:

[7] "Preliminary resort to an administrative agency is not necessary where no administrative remedy is available to the litigant, or where the action presents matter beyond the power or jurisdiction of the agency to afford adequate remedy, or where the jurisdiction of the agency over the question involved is not exclusive." 73 C.J.S. Public Administrative Bodies and Procedure, p. 361, 362.

"Pending a proceeding before an administrative agency, the courts may grant injunctive relief to assist the agency in preserving the status quo until the administrative question before the agency has been determined by it. . . . The action in such cases is to protect, rather than to defeat, the jurisdiction of the agency which has the matter under consideration." *Supra*, p. 363.

[fol. 130]

IV

The Lower Court Had Jurisdiction to Issue the Preliminary Injunction Under the Clayton Act

The verified complaint and McWilliams' affidavit state that the proposed rates are substantially all below the out-of-pocket cost of the rail service, and that the railroads are attempting, by charging rates below cost, to monopolize the transportation of grain, in violation of Section 2 of the Sherman Act. These charges are, of course, denied, creating a factual issue which should be resolved by the Court below. That Court had jurisdiction to decide that issue.

Section 2 of that Act states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . ." [15 U.S.C. 2]

The right of an equity court to enjoin threatened violations of the Sherman Act by Section 16 of the Clayton Act reads:

> "Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States [fol. 131] having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles an injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, that nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1, 8, 12, 13, and 19 of Title 49,

> *in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission*" [15 U.S.C. Sec. 26 emphasis supplied].

It is clear that under the above-quoted portion of the Clayton Act private persons are entitled to enjoin railroads to restrain threatened damage by a violation of the anti-trust laws if that remedy is not subject to the *jurisdiction* of the Interstate Commerce Commission, 15 U.S.C. 26; *Central Transf. Co. vs. Terminal R.R.* 288 U.S. 469 (1933). *Georgia* vs. *Pennsylvania R.R.*, 324 U.S. 455 (1945); *S.S.W., Inc.* vs. *Air Transport Ass'n of America* (D.C., Cir. 1951), 191 F. 2d 658, cert. denied 343 U.S. 955. Since the Com-[fol. 132] mission has no jurisdiction to extend the seven-month suspension period provided for in the Interstate Commerce Act (49 U.S.C. Sec. 15(7)), a barge owner seeking injunctive relief under section 16 is not within the prohibition in question.

In *S.S.W., Inc.* vs. *Air Transport Ass'n of America*, supra, the court said:

> ". . . 'the antitrust laws can have only limited application to industries regulated by specific statute.' But, in view of the importance of the antitrust laws to the unregulated part of the economy, the rule has developed that *the mere existence of a regulatory statute does not result in complete withdrawal of the regulated industry from the* operation of the antitrust laws. . . . If, however, the regulatory agency has not been authorized to deal with the subject matter of the complaint, as was the case with the Interstate Commerce Commission and broad rate fixing combinations, the courts retain jurisdiction under the antitrust laws to grant relief [*Georgia* v. *Pennsylvania R.R.*, supra]. Thus in each case brought against a regulated company under the antitrust laws, the subject matter and remedy afforded by the regulatory statute are compared with that of the antitrust laws. If the latter either cover subject matter outside the scope of the Commission's power *or provide a remedy which the Commission may not give*, then

> they remain in effect to that limited extent. This sort of approach gives the greatest possible effect to congressional intent." [191 F. 2d at 661-662; emphasis added].

[fol. 133] We are contending before the Commission that the proposed rates are unlawful as violative of the Interstate Commerce Act. However, the Commission has exhausted its jurisdiction to prevent their becoming effective. If they are also unlawful under the anti-trust laws, as we insist, the mere failure of the Commission to take action within seven-months' period should not leave the railroads free to pursue their unlawful objectives. Such clearly was not the Congressional intent.

Conclusion

We respectfully urge the Court to ponder carefully the effect of a denial of jurisdiction. If the Court is impotent, then any reduction in rates proposed by any carrier, rail, barge or truck, regardless of how violative it is of the Interstate Commerce Act or the Anti-Trust Act, and regardless of the irreparable injury it causes, will go into effect if the Commission fails to act within seven months. In fact, the more devastating the rate is, the more it departs from established rate making principles, and the more opposition it generates, ~~the more likely~~ it is that the [fol. 134] Commission will not act in seven months, and the rates will have to go into effect. Thus, competing carriers will be free to apply the law of the jungle rather than the laws of equity.

While the Commission is impotent, we respectfully submit that the Courts are not.

Respectfully submitted,

Sirote, Permutt, Friend & Friedman, By: Morris K. Sirote, First Federal Building, Birmingham 3, Alabama, By: John C. Lovett, Benton, Kentucky, Joe Starnes, Jr., Guntersville, Alabama, Attorneys for Appellants.

[fol. 135] Certificate of Service (omitted in printing).

[fol. 136] [File endorsement omitted]

[fol. 137]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, D/B/A O. J. Walls Company, JOHN D. BAGWELL FARMS & HATCHERY, a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Appellants,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Appellees.

Before: Hon. Richard T. Rives, Hon. Warren L. Jones (Judge Jones not present), and Hon. Walter P. Gewin, United States Circuit Judges.

At: Montgomery, Alabama, August 8, 1962.

Transcript of Proceedings

Appearances:

For Appellants: Sirote, Permutt, Friend & Friedman and Morris K. Sirote (Morris K. Sirote and William West), John C. Lovett, Joe Starnes, Jr.

Amicus Curiae on behalf of Appellants: Charles J. McCarthy.

For Southern Railway Company: Cabaniss & Johnston (Joseph F. Johnston, Leigh M. Clark and Maxwell Alston), William D. McLean, John F. Donelan, S. S. Wilbanks, [fol. 138] Rushton, Stakely and Johnston (Marion Rushton).

Amicus Curiae on behalf of Southern Railway Company: Walker P. Johnson, Jr.

For Louisville & Nashville Railroad Company: Lange, Simpson, Robinson & Somerville (Henry E. Simpson).

Amicus Curiae on behalf of Appellees: Karl C. Grannan, Attorney, U. S. Department of Agriculture.

(The above cause coming on for hearing at Montgomery, Alabama, August 8, 1962, before the above constituted court, the following proceedings were had:)

Judge Rives: Gentlemen, the case before us this morning is Arrow Transportation Company and others against Southern Railway Company and others. And as I understand it, it is all a motion for a—for an injunction to preserve the status quo pending appeal. I would like, before calling for appearances, to make some explanation about the court. As you gentlemen know, this is not the usual time of year for the court to hold, but we do have, under our Fifth Circuit Rules and Practices, summer panels, panels that are appointed to hold in all matters of emergency that arise while the court is in vacation. The panel for this week consists really of Judge Warren L. Jones, Judge Gewin, and myself. Judge Jones is in Jacksonville, [fol. 138a] Florida, attending to other business, and it was inconvenient for him to be here; he is not present. Under the statute, I believe it is Section 46 of Title 28, a majority of the court constitutes a quorum, so that the legally constituted court before you gentlemen this morning is Judge Gewin and myself. Judge Jones has had an opportunity to see the briefs in the case. I leave to you gentlemen entirely whether you wish to enter a stipulation that in the event there should be any disagreement between Judge Gewin and myself Judge Jones should participate in the case upon the briefs; there is a possibility that that might be necessary to break a deadlock. Not that we have indicated any views in advance at all, but—and that is entirely a matter for you gentlemen to agree. If you want to think about it for a moment, or even—

Mr. Johnston: Entirely agreeable with me, your honor.

Mr. Lovett: It is entirely agreeable with the appellants.

STIPULATION RE: PARTICIPATION OF JUDGE JONES

Judge Rives: It may be stipulated, then, in this case that in the event there is any disagreement between Judges Jewin and Rives that Judge Jones will participate on briefs as a member of the court.

Mr. Lovett: (Nodded to indicate affirmative reply.)

APPEARANCES

Judge Rives: Stipulation made in open court; court reporter will take it down. I might then call for appearances on both sides; appellants? Are the appellants pres- [fol. 139] ent, and will they enter appearances, please?

Mr. Lovett: John Lovett, Benton, Kentucky, attorney for the appellants, Arrow Transportation Company, O. J. Walls Company, and the John D. Bagwell Company.

Mr. Sirote: Morris Sirote, associated with Mr. Lovett for the appellants.

Mr. Starnes: Joe Starnes, Jr., for the City of Guntersville, Alabama.

Judge Rives: I believe there are some attorneys for the T.V.A. who filed a brief; they wish—

Mr. McCarthy: Yes, your Honor; I am Charles J. McCarthy, General Counsel for T.V.A.

Judge Rives: You appear as Amicus Curiae?

Mr. McCarthy: Appearing as Amicus Curiae.

Judge Rives: Your interest being with the appellants?

Mr. McCarthy: That is correct.

Judge Rives: I see. Appearances for the appellees?

Mr. Johnston: Joseph F. Johnston, Leigh M. Clark, and Maxwell Alston, of Birmingham; John Donelan, D-O-N-E-L-A-N, of Washington, D. C., and might I ask that—Mr. Donelan, who is here, is a distinguished member of the District of Columbia bar and is representing the railroads as chief counsel in the case pending before the Commission, and I would ask that Mr. Donelan be admitted for the purpose of appearance in this case.

Judge Rives: Very happy to have him; you will be ad- [fol. 140] mitted ad hoc.

Mr. Johnston: Mr. William D. McLean, General Solicitor of the Southern Railway System, Washington, D. C., also appearing, and Mr. McLean is a member of the bar of this court, I believe.

Mr. McLean: No, sir; I am not.

Mr. Johnston: He has been—

Mr. McLean: I have appeared in this court before.

Judge Rives: Mr. ~~McLe~~an will be admitted ad hoc, also.

Mr. Johnston: We have, also, counsel for—Amicus Curiae on the side of the several—Amicus Curiae on behalf of the appellees in the case, Mr.—

Mr. Grannan: I am Mr. Karl Grannan, we are filing a brief as Amicus Curiae; I represent the Department of Agriculture in Washington, D. C.

Mr. Johnston: Mr.—I ask that Mr. Marion Rushton appear, also, for the Southern, and there will be—I think he is delayed in arriving, Mr. Walker Johnson, Assistant Attorney General of the State of Georgia, who will appear and file a memorandum, Amicus Curiae, on behalf of the appellees I believe. I believe that is—oh, Mr. Henry Simpson.

Mr. Simpson: Henry Simpson, of the firm of Lange, Simpson, Robinson & Somerville, in Birmingham, appearing for the appellee, Louisville & Nashville Railroad Company.

[fol. 141] Judge Rives: That completes the appearances, I believe. Are the appellants ready for this hearing?

Mr. Lovett: Yes, sir.

Judge Rives: And are the appellees also ready?

Mr. Johnston: We are ready.

Judge Rives: Am I correct that this hearing is limited to a motion for an injunction to preserve the status quo pending appeal?

Mr. Lovett: Yes, sir.

Mr. Johnston: I would comment on that that I am prepared for the Southern, the Frisco, and the Seaboard, and I believe the L. & N. has—concurs, to submit this case on the appeal. It is—it is—perhaps would be a little irregular in the sense of the time for filing the briefs and that sort of thing, but it is our view that the issues on the restraining order and the issues on the basic case are so identical that no good purpose would be served by trying this thing in two bites, when in a sense we are now in the Court of

Appeals, and particularly in view of the fact that as we see it the primary issue of jurisdiction of the subject matter is a matter that is, under the Federal Rules as we understand them, always before the court; we are willing and suggest that the submission be on the whole appeal at this time.

Judge Rives: Have you gentlemen had any discussion among counsel about that?

Mr. Johnston: No, sir; I have not had an opportunity [fol. 142] to discuss it with counsel. I make this suggestion in open court.

Mr. Lovett: If the court please, we have no desire to procrastinate or delay, and we would be perfectly willing that that be done, if we were given twenty-four hours in which to file a reply brief; we have not had that opportunity.

Judge Rives: Is that satisfactory?

Mr. Johnston: I think—just a moment, let me consult counsel. Let me say—that is entirely agreeable—

Judge Rives: Appellants' counsel wishes to make some further statement.

Mr. Johnston: We are troubled about the restraining order situation, obviously, if the court please, and let me say that—this without prejudice to our insistence that this restraining order should be immediately dissolved, we are of course entirely willing to accept the twenty-four hours reply on the—on the submission of the—of the appeal, itself; we are here to—to deal with the matter of the restraining order, and we would—we are—will at the proper time urge the court to—to dissolve that in any event today.

Mr. Lovett: If the court please, I have been reminded by my associate counsel that the delay of the mail might require forty-eight hours to get the brief in. That would be the maximum that we would request.

Judge Rives: Well, unless you gentlemen stipulate on the matter, and unless the court—we wouldn't want the status quo changed—we were to hear it on the merits. And [fol. 143] unless you gentlemen are willing to stipulate on the matter, I think we would have to hear it on the motion for an injunction to preserve the status quo pending appeal. We will take a brief recess, for five minutes, and let you all consider the matter if you like.

Mr. Johnston: We would sure appreciate it.

Judge Rives: Discuss it among yourselves; suppose we just take a brief recess then.

Mr. Johnston: Thank you, sir.

Judge Rives: You gentlemen consider the matter and discuss it among yourselves; we will take a five minute recess.

(At which time, 11:10 a.m., a recess was had until 11:20 a.m., at which time the hearing continued.)

Judge Rives: Have you gentlemen been able to agree upon anything, or what is your announcement?

Mr. Lovett: Yes, your honor; I think we have agreed upon a stipulation; that in order to submit the matter as swiftly as possible, we have agreed that within ten days the appellants will have the right to file a brief on the ultimate merits of the appeal, which has not yet been done, of course, and that the appellees will have five days thereafter in which to file a reply brief, and that the case will then be regarded as submitted to the court without further oral argument for opinion and order, subject to the court's approval, of course.

Judge Rives: That satisfactory to you?

Mr. Johnston: That is satisfactory to us. You under-[fol. 144] stand that is not—and we will deal with the matter of the restraining order; we are not agreeing to—to the continuation in effect of the restraining order, we will deal with that today in the argument.

Judge Rives: I may say, if we are going to consider it on the merits, gentlemen, I believe we would maintain the status quo until we do it, decide it; I don't want you to be under any misapprehension about that. You would resist that, I am sure, and I wouldn't want—wouldn't stipulate to it, but I think the court would not want the status quo changed.

Mr. Johnston: I wouldn't—I would hope the court wouldn't make a decision on the argument that we are going to make here today in advance of the argument, because we think that that would be—a wrong answer for the court to—to continue the restraining order without—without listening to this thing today.

Judge Rives: Of course I may be jumping ahead and deciding that in advance, but I think—

Mr. Johnston: Because we are confronted here today—

Judge Rives: I didn't want you to be stipulating and prejudicing your position unnecessarily; we will be more inclined to continue the restraining order if we decide it immediately.

Mr. Johnston: What we have here today, of course, is a motion on the restraining order. The case is—has been [fol. 145] appealed and is—is docketed, I take it, or will be docketed on the regular appeal docket of the court, so we are here to argue the restraining order. Whether we agree or not to short circuit the final submission on the appeal, it doesn't seem to me should influence the court in determining the issue today as to whether or not it will enter a restraining order. If the thing goes on to the regular docket and is set up in November or January or whenever it would be, that will be all the more injury, as we see it, to the public in the question of these rates, and we, therefore are here to insist that this restraining order be —be removed. Now, if it is removed, we don't have any particular interest in expediting the appeal, but the appellants do, and I have simply said that we were willing to save the time of the court on further arguments and to short circuit the ultimate submission on this appeal; we are confident that we will persuade the court that the restraining order should be removed, but at that point it would be our interest to delay the appeal. Not to extend it we are willing to expedite the submission and to submit on briefs as stated by counsel within that period of time without further argument.

Judge Rives: Let me clearly understand then; if we—we will take the submission under your conception on the restraining—on the motion for the preliminary—injunction pending appeal today, now, in any event, however that may be ruled on, we will take submission on the merits with briefs to be filed. I expect under that situation it would be [fol. 146] understood that Judge Jones would participate in full on the merits, whether—whether there is any disagreement as between Judge—Judge Gewin and myself or not; so with the understanding, then, that we will hear the arguments on motion for injunction to preserve the status quo pending appeal today, and we may announce or may not announce our ruling on that today, it is stipulated that the case will be submitted on briefs on the merits, and the briefs to be filed when?

Mr. Lovett: The briefs for the appellants to be filed within ten days, I suppose from today, and the briefs for the appellees within five days thereafter, and the court will take it under submission fifteen days from today.

Judge Rives: Very well. With that understanding, the court will not, of course, necessarily hold up any ruling on the restraining order pending the merits, we will hear from you all on argument on that. Now, how much time do you gentlemen wish for argument on the—on the motion for the preliminary—for the injunction pending appeal?

Mr. Lovett: We would expect that thirty minutes would suffice for the appellants.

Judge Rives: Thirty minutes; all right, sir.

Mr. Johnston: That will be agreeable with us.

Judge Rives: You may divide that in two as much as you please on opening and close, providing you make a fair statement of your issues on opening.

[fol. 147] Mr. Lovett: Thank you, sir. May I request the attitude of the court concerning two arguments to the side? Mr. Sirote and I would prefer to split our argument, if we might.

Judge Rives: That is entirely all right; you may have two counsels to the side arguing the case, and you—you want one or two, any number you may see fit.

Mr. Lovett: Then may I have fifteen minutes and Mr. Sirote ten, and say—ten, and two and say three minutes for rebuttal.

Judge Rives: You gentlemen keep time on yourselves for the division of time; we will keep the total on you. I don't suppose any of the Amicus Curiae—they filed briefs, and they don't care to argue orally.

Mr. McCarthy: I don't think I care to argue orally, your Honor.

Mr. Grannan: That is also our position.

Judge Rives: All right, sir. Very well, then, we will hear from the appellants.

Mr. Lovett: May it please the court—

Judge Rives: Come around to this table.

Mr. Lovett: As the court has indicated, this is before the court on a motion for a preliminary injunction to preserve this status quo pending the appeal.

Judge Rives: Now, Mr. Reporter, you need not take down the arguments.

[fol. 148] (At which time Messrs. Lovett, Sirote, Johnston and Donelan argued to the court, Mr. Lovett arguing further in rebuttal.)

Judge Rives: Gentlemen, the court is going to take a recess at this time for ten minutes. You come back at the end of that time, and we will have an announcement whether we have reached a decision or not. We will stand in recess for ten minutes.

(At which time, 1:03 p.m., a recess was had until 1:13 p.m., at which time the hearing continued.)

Judge Rives: Gentlemen, we have, of course, both studied this case as much as we could while it has been pending. We realize the necessity of a prompt decision on it. Our conclusion is this: The court considers that there is no reasonable prospect that the appellants will ultimately be successful upon this appeal, for the reason that the District Court was without jurisdiction, as more fully set forth in that court's opinion. The motion for injunction pending appeal is therefore denied. But in order to give the appellants a reasonable opportunity to seek further relief before the Supreme Court or Justice thereof, the temporary restraining order heretofore entered in this cause is continued in force to and including Saturday, August 11, 1962, and at the end of that date said temporary restraining order shall expire. That will be the judgment of the court. Court will stand in recess until two thirty, at which time we have a habeas corpus.

[fol. 149] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 150] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

19928

ARROW TRANSPORTATION COMPANY, a corporation, et al.,
Appellants,

versus

SOUTHERN RAILWAY COMPANY, a corporation, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama (Southern Division)

ORDER DENYING MOTION FOR INJUNCTION PENDING APPEAL—August 8, 1962

Before Rives and Gewin, Circuit Judges.

Per Curiam:

The Court considers that there is no reasonable prospect that the appellants will ultimately be successful upon this appeal for the reason that the district court was without jurisdiction, as more fully set forth in that Court's opinion. The motion for injunction pending appeal is therefore denied; but, in order to give the appellants a reasonable opportunity to seek further relief before the Supreme Court or a Justice thereof, the temporary restraining order heretofore entered in this cause is continued in force to and including Saturday, August 11, 1962, and at the end of that day said temporary restraining order shall expire.

Richard T. Rives, Walter P. Gewin, U. S. Circuit Judges.

Filed Aug 8/62
R. T. Rives, Judge

[fol. 151] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

ARROW TRANSPORTATION COMPANY et al., Applicants,

v.

SOUTHERN RAILWAY COMPANY et al.

Application for Extension of Temporary Restraining Order

OPINION—August 17, 1962

MR. JUSTICE BLACK.

This is an application for extension of a temporary restraining order granted by United States Circuit Judge Gewin on August 3, 1962, and temporarily continued by Circuit Judges Rives and Gewin on August 8, 1962. While applicants also ask in the alternative for "injunctive relief," this need not be considered because of my conclusion that they are entitled to have the temporary restraining order extended.

The complaint in the District Court was for an injunction to restrain the defendant railroads from putting into effect a reduction in railway rates for carrying grain in interstate commerce. The reduction was published in a tariff schedule filed with the Commission under authority of § 6(1) of the Interstate Commerce Act, 49 U.S.C. § 6(1). Under § 15(7) of that act the Commission can suspend such new rates for a maximum seven months' period pending hearings on their lawfulness, but if hearings are not completed within seven months the proposed rates "shall go into effect at the end of such period . . . ." Finding that the rates here involved might be "unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy," the Commission suspended the proposed tariffs but failed to complete its hearings and enter a final order as to the lawfulness of the rates within the seven month period.

[fol. 152] After a brief voluntary suspension by the railroads, the plaintiffs brought this proceeding in the District Court for an injunction, invoking jurisdiction under 28 U. S. C. § 1331, the general federal question provision, § 1332, the diversity provision, and § 1337, which grants jurisdiction for cases arising under federal acts regulating commerce or protecting it against restraints and monopolies. The complaint shows diversity and federal questions and also charges the defendant railroads with conspiracy to violate the antitrust laws and with seeking to reduce rates so drastically that they would be below costs of transportation and would in some instances be below combined railroad-barge rates even if barges carried the grain substantially or wholly free. This latter consequence, it was charged, violates the policy declared by Congress and several times sustained by this Court designed to secure for barge transportation all inherent advantages it has which enable it to transport commodities cheaper than railroads. See note preceding 49 U. S. C. § 1; *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56 (1956); *I. C. C.* v. *Mechling*, 330 U. S. 567 (1947). See also *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N. D. Ala. 1959).

The District Judge, after hearings and arguments, found that there was grave danger that putting the new rates into effect would inflict irreparable damages on the plaintiffs and that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time . . . . " He nevertheless refused to grant relief on the ground that he was without jurisdiction "to enjoin or suspend the effectiveness of rates published by common carriers and subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates." This lack of jurisdiction was apparently based on the court's interpretation of § 15(7) as not only depriving the Commission of jurisdiction to suspend rates longer than seven months but also [fol. 153] as completely ousting the jurisdiction of a federal court to grant any kind of relief from such rates, however unlawful, unreasonable, and unjust they might be and however deliberately destructive of barge competition.

The Court of Appeals refused to grant an injunction pending appeal by the plaintiffs because it believed that there was "no reasonable prospect" that the plaintiffs would "ultimately be successful" in reversing the District Court's holding that it had no jurisdiction. The Court of Appeals nevertheless continued Judge Gewin's temporary restraining order to give plaintiffs the opportunity to seek relief from this Court "or a Justice thereof."

I am not so sure as the judges of the Court of Appeals that plaintiffs are bound to fail in obtaining review by this Court of the crucial question of the District Court's jurisdiction. This Court has never decided that § 15(7) must be given an interpretation which so substantially destroys the jurisdiction of federal courts to restrain unlawful conduct which inflicts irreparable damage. The consequence is that I think the plaintiffs are entitled to have the temporary restraining order issued by the Court of Appeals extended in order to maintain the *status quo* pending final action in this Court on the question of the District Court's jurisdiction.

The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated grain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting from the issuance [fol. 154] of its order. I agree that this bond is sufficient. If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations.

The temporary restraining order of the Court of Appeals is hereby extended, pending the presentation to this Court of a petition for writ of certiorari to review the decision of the Court of Appeals denying an injunction pending appeal, and pending final consideration and action by this Court on that petition. Plaintiffs are directed to file such petition within 30 days from the date of this order.

[fol. 155] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. ...., October Term, 1962.

ARROW TRANSPORTATION COMPANY et al., Petitioners,

vs.

SOUTHERN RAILWAY COMPANY et al.

ORDER—August 17, 1962

Upon Consideration of the application of counsel for petitioners and of the opposition of the respondents thereto,

It Is Ordered that the temporary restraining order of the United States Court of Appeals for the Fifth Circuit of August 3, 1962 be, and the same is hereby, extended pending the presentation to and disposition by this Court of a petition for writ of certiorari to review the decision of said Court of Appeals of August 8, 1962 denying an injunction pending appeal. Such a petition for writ of certiorari shall be filed within thirty (30) days from this date.

The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. The conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond and when approved, it shall be filed with the Clerk of the Court of Appeals.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of August, 1962.

[fol. 156] [File endorsement omitted]

[fol. 157]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed August 27, 1962

Appellee Southern Railway Company respectfully requests that the Court require appellants to file a bond herein conditioned to protect appellees against the costs resulting from the restraining order entered by Mr. Justice Hugo L. Black. Justice Black's order of August 17 provides with respect to a bond:

> "The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. The [fol. 158] conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond and when approved, it shall be filed with the Clerk of the Court of Appeals."

It is clear under the applicable rule and authorities, as well as the terms of Justice Black's order, that appellees are entitled to a bond which would adequately cover their actual costs resulting from the stay.

Rule 65(c), Federal Rules of Civil Procedure, 28 U.S.C. Rule 65(c), provides:

> "(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . ."

The language of the applicable rule is clear and to the point. This entitles Southern Railway Company to security bond and the injunction must be denied or vacated if applicant fails to give such security. *Holahan* v. *Holahan*, 8 F.R.D. 221 (W.D. N.Y. 1948); *Allen* v. *Pyrene Mfg. Co.*, 111 F. Supp. 819, 820 (D. N.J. 1953).

In *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157 (1939), Mr. Justice Black referred to "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all —including the public—whose interests the injunction may affect." Here, of course, there is no way to protect the public against irreparable loss, but Southern at least has demonstrable costs which can be covered.

[fol. 159] The courts have recognized in setting the amount of the security that a precise and absolute figure in dollars and cents is not required in setting the costs and damages to be incurred or suffered as a measure of the bond. This is, of course, distinct from the proof of a claim on the bond if later submitted.

> ". . . Necessarily, at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate. . . ." *International L. Garment Work Un.* v. *Donnelly G. Co.*, 147 F. 2d 246, 252-253 (8th Cir.), cert. denied, 325 U.S. 852 (1945).

In *Breswick & Co.* v. *United States*, 100 L.ed. 1510 (August 3, 1955) (not officially reported), an opinion by Mr.

Justice Harlan, granting in part and denying in part an application for stay of an injunction and supersedeas pending appeal, it was said, on the issue of securing the plaintiffs there:

> ". . . As I see it, the outside limit on the possible loss to the plaintiffs, should they ultimately succeed in their contentions, is the highest value that their stock might have attained, had Alleghany been subject to the Investment Company Act's requirements, and had no dilution of the plaintiff's equity by reason of 'conversion' taken place, during the pendency of this litigation. *I think a bond can be devised to cover such contingencies adequately, even though in the nature of things no precise estimate can be made of the possible future value of plaintiffs' stock. . . .*" 100 L. ed. at 1513-1514. (Emphasis added).

Gordon Johnson Co. v. Hunt, 109 F. Supp. 571 (N.D. Ohio 1952) involved a suit and countersuit to enjoin certain patent infringements. Defendants' prayer for a preliminary injunction was granted. As to the proper amount of supersedeas bond to be required for a stay of the preliminary injunction, the court said:

> [fol. 160] "In the affidavit of one of plaintiff's accountants calculations appear and certain figures therein to support the claim of the plaintiff as to the loss which it would sustain by the granting of the injunction. Upon full consideration it is the opinion of the court that a stay bond should be approved in this case because of the preliminary nature of the order appealed from. *It would be impossible for the court accurately to determine the precise amount of loss and damage which the defendants may sustain by the stay of the injunction pending appeal,—the court can only approximate it* and, as I think, should fix the bond on the basis of a period of six months which ought certainly to cover the period of the pendency of the appeal." (Emphasis added).

Again, the court based the bond requirement on the best possible *estimate* from the record before it.

In view of Justice Black's memorandum, we do not include in the amount of bond now requested any protection for loss of profits, although we believe that appellees are entitled to recover such losses, but it is clear that actual allowance should be made in the security for all costs and expenses respondents will incur, which they would not otherwise have incurred, but for the injunction, stay or restraining order. See *Monolith Portland Mid. Co. v. Reconstruction F. Corp.*, 128 F. Supp. 824, 881 (S.D. Cal. 1955), modified (on different point), 240 F. 2d 444 (9th Cir. 1957), cert. denied, 354 U.S. 921 (1957). In that case, monetary damages were also assessed on an injunction bond for depreciation of the property involved, and interest.

[fol. 161] *The Amount of the Bond*

The bond heretofore filed by appellants has now expired by its terms and a new bond must now be required pursuant to Mr. Justice Black's order.

When bond was fixed by Judge Gewin upon entering his restraining order of August 3, it was in contemplation of a stay in the effectiveness of the rates of a very few days at the most. The rates were scheduled to go into effect on August 7 and this Court convened the following day and disposed of the issues. The restraining order was extended for three additional days.

The restraining order granted by Mr. Justice Black, however, is of an entirely different character in that it may continue for a matter of months. Obviously the $10,000 bond initially required is inadequate to cover the costs and damages which the appellee will sustain over this much longer period.

The attached affidavit of Robert S. Hamilton shows that Southern Railway is incurring very substantial costs each day it is restrained from putting the rates into effect. There is no possibility during this time of offsetting these costs and the losses sustained thereby are continuing and inescapable. The affidavit shows that the cost of ownership alone of the "Big John" cars, which were acquired solely for use in handling the new and additional traffic to be hauled under the suspended rates, amounts to $3510 per day. This affidavit also shows that additional units of motive power have been acquired to haul this traffic and that in [fol. 162] the absence of this traffic, which can only be generated through the use of the suspended rates, these additional locomotive units are standing idle.

Justice Black's restraining order is to continue until disposition by the Supreme Court of a petition for certiorari in this case which he has directed appellants to file within 30 days from the date of his order. Presumably the Supreme Court will act on such petition within a reasonable time after it convenes in October, but it is not to be anticipated that such disposition would be within 60 days of the date of Justice Black's order.

It is also to be noted that the imposition of the restraining order has put appellee to considerable expense in the employment of counsel, reproduction of briefs, travel expenses and other costs which it would not have incurred had these restraining orders not been issued. Appellee does not at this time know the exact amount of such costs and consequently no request is made for bond to cover such costs. This is mentioned simply to show that the bond requested is in a minimum and exact amount.

Accordingly, appellee requests this Court to fix bond in the amount of the actual cost suffered by appellee in the amount of $3510 a day, representing the cost of ownership of the "Big John" cars, for a period of 60 days from August 17, 1962, or a total amount of $210,600 plus an additional $10,000 to cover the other costs provided in the Court's original bond, or a total of $220,600.

[fol. 163] Appellee further requests that this Court retain jurisdiction for the purpose of requiring additional bond of the same character as the bond here requested in the event that Justice Black's restraining order should continue in effect beyond 60 days from August 17, 1962.

The order requiring the bond should provide that it be filed and approved promptly. The period of 5 days is suggested as a reasonable time for such filing and approval.

Respectfully submitted.

Jos. F. Johnston, William D. McLean

Certificate of Service (omitted in printing).

[fol. 164]

Attachment to Petition

Affidavit

District of Columbia, ss.

Robert S. Hamilton, being duly sworn, deposes and says, that he is Vice President, Marketing and Research, Southern Railway System; that he is thoroughly familiar with the multiple-car rates on grain from river crossings to the Southeast now before the Interstate Commerce Commission in its Docket I & S No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South;* that he has participated actively in the decisions of Southern Railway's management in connection with these grain rates and in connection with ensuring the availability of the necessary equipment and motive power to transport said grain under such rates; that Southern Railway System has purchased 500 "Big John" heavy loading aluminum hopper cars solely for the purpose of transporting additional grain traffic under these multiple car rates into the southeastern states; [fol. 165] that Southern is now being prevented from anything more than token use of these railroad cars in transporting such grain under the involved rates by virtue of the stay order of Mr. Justice Black of the Supreme Court of the United States entered on August 17, 1962; that new grain traffic under these rates, had they become effective, would have been available to Southern, requiring full use by Southern of said 500 "Big John" cars for transportation of grain to the southeastern states; that such "Big John" cars have received only sporadic and intermittent use since they were acquired, the total movement of grain in such cars through August 16, 1962, on short intrastate hauls and Government movements under these rates, being 1573 cars (equivalent to only three round trips for each of the 500 cars over a period in excess of one year); that such "Big John" aluminum hopper cars represent a major technological breakthrough on the part of Southern following long and expensive research and development; that the cost of ownership of said "Big John" hopper cars is $7.02 per car per day, or $3510 per day for the fleet of 500 cars; that by virtue of the said stay order of Mr. Justice Black and so long as it shall remain in effect Southern Railway is incurring, and will continue to incur, costs of at least $3510 per day, without reimbursement therefor, as a direct result of its being prevented from obtaining grain traffic under the multiple-car rates on grain, stayed by said order, which traffic would otherwise be available to and be transported under said rates in said cars by Southern Railway; that for the purpose of ensuring efficient movement of said "Big John" hopper cars of grain to the Southeast under said rates Southern Railway Company also pur-[fol. 166] chased additional diesel locomotive units to increase its motive power capacity for the purpose of handling this traffic; that these costs per day are also being incurred and suffered by Southern Railway, without reimbursement therefor, as a direct result of its being prevented from obtaining grain traffic under the multiple-car rates on grain by the aforesaid order by Mr. Justice Black; that these combined costs being incurred by Southern Railway, without reimbursement, as a result of said order amount to not less than $3510 per day.

Robert S. Hamilton

Subscribed and sworn to before me this 24th day of August, 1962. P. K. Howard, Notary Public. My Commission expires May 1, 1965.

[fol. 167] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19928

[Title omitted]

ANSWER OF APPELLANTS TO PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed August 30, 1962

An analysis of the petition filed by Appellee Southern Railway Company, when stripped to its basic essentials, reveals a request that Appellants be required by this Court to furnish a new bond in the amount of $220,600.00. Appellants respectfully state that the granting by this Honorable Court of the full relief encompassed in the petition of [fol. 168] the Southern Railway Company for the requirement of bond by the Appellants, in effect, would violate both the letter and the spirit of the opinion and of the restraining order entered by Mr. Justice Black on August 17, 1962.

It is pertinent to note that of the four Appellees, it is only Southern Railway Company who now requests a new bond in the astronomical amount of $220,600.00. The Southern Railway Company well knows that the Appellants are not able to make a bond of this size. It further knows that if the Appellants are maneuvered into the position of being unable to post such a bond this would, in effect, nullify any relief which might ultimately accrue to Appellants from a favorable decision by the Supreme Court of the United States on the matter to be presented to it. Further, the Southern Railway Company is fully cognizant of the fact that if the Appellants are unable to have the stay which has been granted by the Supreme Court continued, the Supreme Court's jurisdiction to decide the ultimate question to be presented would be ineffective. The entire controversy would then be moot, and any subsequent decree in Appellants' favor would be nugatory.

[fol. 169] This is not a matter which is presented for the first time. The question of the amount of the bond and the duration of the stay have been exhaustively researched, and briefs covering these points were submitted to Mr. Justice Black. Affidavits and counter-affidavits, advancing the respective contentions of the parties, have been heretofore presented to the reviewing courts and constitute a part of the record on this appeal. Because of this and of Appellants' interpretation of Mr. Justice Black's opinion and decree, Appellants have not further burdened the record by filing additional counter-affidavits at this time.

The initiation of this petition by the Southern Railway Company is a patent effort to have this Court disregard the opinion rendered by Mr. Justice Black on August 17. In this regard, Mr. Justice Black's opinion, in pertinent part, reads as follows:

> "The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated grain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, [fol. 170] which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. *The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting from the issuance of its order. I agree that this bond is sufficient.* If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations." (Emphasis supplied)

Appellee Southern Railway Company cites Mr. Justice Black's order to support its position. This order, in pertinent part, provides:

> "The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. *The* [fol. 171] *conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond* and when approved, it shall be filed with the Clerk of the Court of Appeals." (Emphasis supplied)

A careful perusal of this order reveals that it is in complete harmony with the opinion, neither of which support Southern Railway Company's position.

In view of the foregoing pronouncements in the opinion and order of Mr. Justice Black, Appellants respectfully submit that he had the advantage of the contentions now advanced by Southern Railway Company when Mr. Justice Black said, with reference to the existing bond which was limited to the amount of $10,000.00—"I agree that this bond is sufficient." He further stated, in substance, that any new bond filed in lieu of the old one should contain "the same conditions, stipulations, and limitations." It is inconceivable, under these circumstances, to reach a conclusion that Mr. Justice Black was doing anything other than decreeing that any new bond which may be required should not exceed the amount of $10,000.00.

The Appellants have no objection to making a new bond [fol. 172] if the Court of Appeals feels, for any reason, that the existing bond has expired or would not protect against the costs resulting from the extension granted by Mr. Justice Black. However, in the current posture of this matter, the Appellants respectfully submit that any new bond required by this Court should contain the "same conditions, stipulations, and limitations" of the old bond. Appellants urge that this new bond should be limited to the amount of $10,000.00. To require a bond in the amount of $220,600.00, as requested by Southern Railway Company, would be a denial of both the letter and the spirit of Mr. Justice Black's opinion and order, and would mean that any ultimate decision in Appellants' favor would be a fruitless victory only.

Respectfully submitted,

Arrow Transportation Company, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., City of Guntersville, Alabama; Sirote, Permutt, Friend & Friedman, First Federal Building, Birmingham 3, Alabama, By Morris [fol. 173] K. Sirote; Lovett and Lovett, Lovett Building, Benton, Kentucky, By John C. Lovett; Joe Starnes, Jr., City Attorney, Guntersville, Alabama.

Of Counsel: Macleay, Lynch, Channing & Bernhard, Commonwealth Building, 1625 K Street, N.W., Washington 6, D.C., Attorneys.

Certificate of Service (omitted in printing).

[fol. 174]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

Appeal from the United States District Court for the Northern District of Alabama.

ORDER TO TRANSMIT CERTAIN ORIGINAL DOCUMENTS TO SUPREME COURT

It Is Ordered that the original Motion for an Injunction to Preserve the Status Quo Pending Appeal, Temporary Restraining Order, Bond for Temporary Restraining Order, and Order Denying Motion for Injunction in the above entitled and numbered cause, be transmitted to the Clerk of the Supreme Court of the United States for use in connection with the petition for writ of certiorari, said original documents to be returned upon final disposition of the case by the Supreme Court.

Edward W. Wadsworth, Clerk, United States Court of Appeals, For the Fifth Circuit, by Clara R. James, Chief Deputy Clerk, For the Court.

[fol. 175] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 176] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, et al., Appellants,

versus

SOUTHERN RAILWAY COMPANY, et al., Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

OPINION—September 7, 1962

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The question for decision is whether a federal district court has jurisdiction to extend by injunction the statutory seven-month period of rate suspension in a proceeding still pending before the Interstate Commerce Commission.

The plaintiffs, appellants, Arrow Transportation Company, et al., seek to enjoin the four defendants, appellee Railroad Companies, from applying to the rail transporta-[fol. 177]tion of grain certain railroad tariff schedules published by them and which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656, 'Grain in Multiple Car Shipments—River Crossings to the South. This appeal is from an order of the district court denying the plaintiffs' motion for a preliminary injunction solely on the ground that it had no jurisdiction of the subject matter.

The complaint based federal jurisdiction on diversity of citizenship, 28 U.S.C.A. § 1332; on the existence of a federal question, 28 U.S.C.A. § 1331; and on the Clayton Antitrust Act, 15 U.S.C.A. § 12, et seq., and 28 U.S.C.A. § 1337. The district court found the general jurisdictional averments as to diversity of citizenship and amount in controversy to be true. It further found that during 1961 the defendants published tariff schedules proposing to reduce substantially their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the Southeast. Its further findings of fact, conclusions of law and order are expressed so clearly and succinctly that they had best be quoted:

> "6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contra- [fol. 178] vention of the National Transportation Policy —." and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.
>
> "7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to ex-

tend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.

"8. The tariff schedules published by the defendants which are currently under investigation by the Commission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a cou . of competent jurisdiction.

"9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still [fol. 179] in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

"10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

"11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

"12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

"CONCLUSIONS OF LAW

"1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

"2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate [fol. 180] Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

"WHEREFORE, it is hereby ORDERED:

"1. That the motion for a preliminary injunction and, a temporary restraining order be and the same is hereby denied.

"2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied."

Section 6 of the Interstate Commerce Act (49 U.S.C.A. §6) provides that rates and charges for transportation shall be initiated and published by the carrier and shall not be changed except after thirty days notice to the Commission unless the Commission, in its discretion and for good cause shown, allows changes upon less notice. The section most pertinent to the present appeal is Section 15, paragraph (7):

"*Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new [fol. 181] individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the [fol. 182] interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice

> is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." 49 U.S.C.A. §15, par. (7).

The Act seems to us to be a model of clarity. It is of course elementary that the power to prescribe rates to be charged in the future is a legislative function. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, 291; *Terminal R. Asso.* v. *United States*, 1924, 266 U. S. 17, 30; *Interstate Commerce Commission* v. *Railway Co.*, 1897, 167 U. S. 479, 499; 13 C.J.S. Carriers, §275(b), pp. 623, 624. Though not so frequently declared in the decisions, it would seem equally clear that the power to suspend or not to suspend rates involves a determination of what the rates shall be during the suspension period, which frequently extends over months and years, and is itself a legis- [fol 183] lative function. See *Board* v. *Great Northern Ry.*, 1930, 281 U. S. 412, 429, 430; 1 Davis, Administrative Law Treatise, §7.08, p. 442; 9 Am. Jur. Carriers, §65, p. 472.

The Congress, in its wisdom, has permitted carriers to initiate their own schedule of rates subject to the authority of the Interstate Commerce Commission to determine the lawfulness of such rates. Pending the Commission's hearing for such purpose, it may suspend the operation of the rate schedule "but not for a longer period than seven months beyond the time when it would otherwise go into effect." 49 U.S.C.A. §15(7). Some irreparable injury appears unavoidable in the process of establishing new rates. If the new rates are ultimately determined to be just, reasonable, and lawful, the carriers and that portion of the public which would benefit from the change in rates have nonetheless suffered irreparable injury during the period of suspension. If the period of suspension has expired and the new rate schedule goes into effect, but is subsequently determined to be unlawful, then competing carriers and that portion of the public which would suffer because of the change in rates has been injured during the period when the rates were not suspended, and in many cases that injury is irreparable.

In case of increased rates, the Commission may require refunds. Experience has proved that such power to require refunds is itself an inadequate and unsatisfactory remedy, but even that remedy is unavailable in the case of reduced rates.

Prior to the Act carriers were at liberty to establish and maintain even unreasonably low rates provided they were [fol. 184] not discriminatory. *Keogh* v. *C. & N.W. Ry. Co.*, 1922, 260 U. S. 156, 161. If cheap rates are monopolistic or in restraint of trade, and are the result of a combination or conspiracy among carriers,[1] the Government has adequate civil and criminal remedies under the Antitrust Act. *Keogh* v. *C. & N.W. Ry. Co., supra.* Section 16 of the Clayton Act, however, clearly stands in the way of private injunctive relief.

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject [fol. 185] to the provisions of chapters 1 and 8 of

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[1] Southern Railway Company has filed an affidavit to the effect that, "There was absolutely no concert of action between Southern and any other railroad in connection with the determination and publication of these rates which subsequently were suspended by the Interstate Commerce Commission and are now being investigated in ICC Docket I. & S. 7656."

> Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Title 15, U.S.C.A. §26.

The Supreme Court has declared:

> "Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. . . ."

Central Transfer Co. v. *Terminal R.R. Ass'n*, 1933, 288 U. S. 469, 474, 475.

Section 8 of the Interstate Commerce Act appears to provide that the carriers would be liable in damages to the persons injured if the cheaper rates are ultimately declared unlawful:

> [fol. 186] "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Title 49, U.S.C.A. §8.

All of the provisions of the Interstate Commerce Act are required to be administered and enforced with a view to carrying out the National Transportation Policy declared in the Act of September 18, 1940, c. 722, Title I, §1, 54 Stat. 499:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, [fol. 187] or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

An unreasonably low rate found to be in violation of the National Transportation Policy would give rise to an action for damages under 49 U.S.C.A. §8. That such a finding may ultimately be reached after full hearing furnishes no authority to the Courts to extend the statutory seven-month period of rate suspension in the face of the clear mandate of the statute that, "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period . . ." [49 U.S.C.A. §15(7).]

Essentially the Court is asked to declare as to the present case that the seven-month period of suspension provided in the statute is inadequate. If that can be done in this case, there is practically no end to the number of instances in which the courts will be called on to set aside the mandate of the statute. Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are [fol. 188] in effect amending the statute and that is a matter beyond their power.

We have given careful consideration to the excellent briefs of counsel on both sides and to those filed by amici curiae. A further discussion of many pertinent authorities would be in order if time were not of the essence. Since, however, this is a case where justice delayed would be justice denied, and we have no doubt of the soundness of our decision, we shall forego any further discussion. Since Southern Railway Company has not appealed, we do not pass on that part of the judgment denying its motion to dismiss. See 7 Moore's Federal Practice, 2nd ed., Sec. 72.05.

To afford the appellants a reasonable time to seek a writ of certiorari from the Supreme Court, it is directed that the mandate of affirmance issue twenty-one days from the date of this decision. See Fifth Circuit Rule 32. If during that period a petition for certiorari has been filed, prompt consideration will be given to any request for a further stay of the mandate. See 28 U.S.C.A. §2101(f); Supreme Court Rule 18.

The judgment of the district court denying the motion for a preliminary injunction is affirmed.

Affirmed.

[fol. 189]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1961
No. 19,928

ARROW TRANSPORTATION COMPANY, et al., Appellants,
versus
SOUTHERN RAILWAY COMPANY, et al., Appellees.

Appeal from the United States District Court
for the Northern District of Alabama.

Before:

RIVES, JONES and GEWIN,
Circuit Judges.

JUDGMENT—September 7, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause denying the motion for a preliminary injunction be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellants, Arrow Transportation Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 7, 1962

Issued:

[fol. 190] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

SUPPLEMENTAL ANSWER OF APPELLANTS TO PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed September 13, 1962

Since filing their original answer to the Southern's petition for requirement of an additional bond, Appellants have received Judge Richard T. Rives' letter of August 29 stating that the Court would pass upon the merits of the appeal as expeditiously as possible and would defer consideration [fol. 191] of the petition for a new bond until the Court has considered the merits. Judge Rives indicated that any further bond might be in a prohibitive amount. In view of the potential hearing on Southern's petition, Appellants now submit this supplement to their answer to Southern's petition for a new and larger bond.

Southern asks that the $10,000 bond be increased to $220,600 to cover one additional item of anticipated cost, i.e., the cost of owning 500 jumbo hopper cars at $7.02 per car per day for 60 days. No claim is being made at the present time for a bond to cover attorney fees, travel expenses, etc.[1] Southern's claim at first blush appears plausible. It therefore merits careful scrutiny.

It should be pointed out, at the outset, that neither Judge Gewin nor Mr. Justice Black restrained Southern from using the jumbo hopper cars. They restrained, instead, the charging of certain drastically reduced rail rates on grain. Southern now seeks to establish, by Mr. Hamilton's affidavit, that by restraining certain *rates* the Courts have in fact restrained the use of certain *equipment*. This, of course, does not follow.

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[1] Attorneys fees and legal expenses other than court costs are not recoverable on an injunction bond. *Oelrichs* v. *Spain*, 15 Wall (US) 211, 21 L.ed. 43; *Tullock* v. *Mulvane*, 184 U.S. 497, 46 L.ed. 657; *Missouri K. & T. R. Co.* v. *Elliott*, 184 U.S. 530, 46 L.ed. 673; see: *Annotation* 164 ALR 1111.

[fol. 192] In the first place, it is abundantly clear that the "Big John" aluminum hopper cars can be and are being used to haul many commodities other than grain. Of course, the use of such equipment moving other commodities has not been restrained. As shown by the attached excerpts from the testimony before the Commission, D. W. Brosman, then Executive Vice-President, now President of Southern, testified that the equipment can be used to haul light clay, shale, feed and other similar commodities. W. M. King, Southern's Vice-President in charge of traffic, testified that the jumbo cars were not intended to be assigned "to grain traffic exclusively" but were being used to move "many commodities that will use this type of equipment".[2] Appellants should not be required to make a bond which contemplates that these 500 cars will be idle 100% of the time, when it is clear that this equipment is in fact in extensive daily use.

In the second place, Hamilton's affidavit is grossly misleading in its factual statements and is therefore unreliable. For example, Mr. Hamilton states that Southern "is now being prevented from anything more than token use of these railroad cars in transporting such grain under the involved rates." [Hamilton Aff. p. 2, underscoring supplied]. With the underscored qualification, the statement may be true. It is, however, decidedly misleading. Actually, the cars [fol. 193] which have been delivered to Southern have been used heavily in grain traffic since their acquisition, although not "under the involved rates." They have been used in moving grain traffic under the *present* rates which are nearly 3 times as high as the involved rates.

Mr. Berger's attached affidavit shows that one shipper at Chattanooga, Tennessee, Cargill, Incorporated, shipped 183 jumbo cars of grain on the Southern between August 10 and August 31, 1962, and Mr. Sprunger's attached affidavit shows that another, Central Soya Company, Inc., shipped 199 jumbo cars of grain from Chattanooga via the

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[2] Bromley's attached affidavit, p. 4, 5.

Southern between March 15, and September 1, 1962. These shipments were not made "under the involved rates"; they were made under the much higher existing rates and the restraining order has not impeded these movements.

These are only two of the hundreds of grain shippers on the Southern. Appellants, of course, have no way of knowing how many other shippers, like Cargill and Central Soya, have been making extensive use of the "Big John" equipment to haul grain under the existing high level of rates.[3] [fol. 194] Southern should be required to disclose this information. In addition, Southern should be required to establish that there are no other commodities being hauled by Southern, such as light clay, shale, feed, which can be transported in the jumbo cars.

Mr. Hamilton's statement (p. 2) that "such 'Big John' cars have received only sporadic and intermittent use since they were acquired" is simply untrue unless it can be regarded as having been qualified by his subsequent use of the phrase "under these rates". The fact is that the cars have been and are being used so extensively by Southern that it has experienced a shortage in these cars. On May 2, 1962, Southern's Western Traffic Manager informed Neumond, Inc., that "all of our covered hopper cars are in assigned service" and that "we are actually short of this type of equipment for loading on our own railroad" (See Aff., Benj. J. Schulein, attached).

The affidavits of Mr. Berger, Mr. Sprunger and Mr. Schulein establish that if Southern wished to make greater use of the new equipment, it has had many opportunities to do so. It could, if it would, make the equipment available for use on off-line hauls of grain, i.e., grain originating on other railroads destined for points on the Southern. [fol. 195] It has not made the equipment available for this use. Southern cannot voluntarily and deliberately keep the equipment idle and claim that it has been damaged by such idleness.[4] One restrained by an injunction has an affirmative duty to mitigate damages and there can be no recovery for damages caused by Southern's deliberate failure to do that which would serve to mitigate damages.[5]

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[3] Southern's witness, Mr. A. C. Henderson, testified on June 19, 1962 that "I do know that grain moved in those [jumbo] cars, what proportion that was of the total, I don't know" [Bromley affidavit p. 6].

[fol. 196] In spite of the extensive use of "Big John" cars in highly remunerative grain traffic movements on the existing rate level, Southern asks a bond covering the full costs of ownership as if all 500 cars would be idle 100% of the time. This is a transparent effort to require a prohibitive bond and to nullify the relief granted by Judge Gewin and Mr. Justice Black.

Southern claims, and Mr. Hamilton's affidavit affirms, that the "Big John" cars represent "a major technological breakthrough" which enables Southern to haul grain at less cost than if the obsolete standard box and hopper cars are used. If this is true, Southern has an affirmative duty to use this more modern equipment in its grain movements under the existing rates and thus to mitigate the damages it would suffer if the equipment were left idle. Indeed, it has the duty to use this equipment for hauling *any* commodity that can be handled more economically in the new equipment than in the old.

Southern may claim that if it substitutes the modern equipment for the standard equipment, some of the obsolete box and hopper cars will become idle. Perhaps so, if we assume that there will be no change in the carloadings of commodities that can be moved in standard cars. If so, the damages will be the depreciation on the obsolete, antiquated equipment made idle by the injunction and not the cost of owning the modern, expensive "Big John" cars. If the volume of other traffic increases, this idleness of stand- [fol. 197] ard cars will diminish and Southern's losses will be reduced. If that traffic volume decreases, the number of idle cars will be increased, but the increase in idleness will not be attributable to the injunction and the damages therefrom will not be chargeable to the Appellants.

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[4] See Berger's affidavit, p. 2, 3. Since Mr. Berger's affidavit was signed, Appellants have learned that on September 4, 1962, Southern by voluntary short-notice action has joined the Norfolk and Southern Railroad in the use of multiple car rates on North Carolina intrastate movement of grain. This action will permit use of the jumbo cars for hauling grain from origins on the Southern to destinations on the N & S and from origins on the N & S to destinations on the Southern. For example, Cargill can now use the new equipment for shipping grain intrastate from its Washington and Wilson, N. C., plants. This action by the Southern, voluntarily withheld since Oct. 26, 1961, will greatly increase opportunities for use of jumbo cars on the multiple car intrastate rates. This is especially true today because the grain harvest season in North Carolina, when intrastate volumes are heaviest, is now at hand.

[5] *I.T.S. Rubber Co.* v. *Tee Pee Rubber Co.*, CA 6, 295 Fed. 479, *Allen* v. *Jones*, CC Ark. 79 Fed. 698; Annotation: 66 ALR 2d. 1132; 28 Am. Jur. *Injunctions*, Sec. 350, p. 866.

And, if Appellants are to be charged with depreciation on the idled obsolete equipment, Appellants are entitled to offset the increased profits which Southern earns when it substitutes the modern equipment for the obsolete equipment. How else can Southern's net loss be determined? For example, as shown in the record, the present all rail rate from St. Louis to Birmingham, Alabama, is $8.70 per ton. A movement under that rate which the railroads themselves established is certainly compensatory to Southern even if the obsolete equipment is used. If the more modern "Big John" cars are used, the profit margin will be greater (if we can believe Southern's claim that this "technological breakthrough" reduces its costs to such extent that it can reduce the rate from $8.70 per ton to $3.12 per ton and still earn a profit). If the bond must cover losses incurred because obsolete equipment is idle, the *net* loss to Southern would be the depreciation on that equipment *less* the increased profits realized from substituting the modern equipment for the antiquated equipment.

Also, Appellants should be credited with the increased profits which Southern will earn on a constant, unchanged movement of grain during the injunction period. To illus- [fol. 198] trate, Mr. Berger's affidavit refers to grain received at Mocksville, N. C., nearly 100% of which arrives via Southern from Chattanooga. The distance is 367 miles. The existing rate is $5.60 per ton. Cargill has been shipping about 15 jumbo cars per week from Chattannooga to Mocksville on that rate and the movement is regular and stable.

yielding gross revenues to Southern of about $8,400.00 per week. Since the proposed rates will not apply to this movement, grain to Mocksville probably would move from Cincinnati if the proposed rates were in effect. This would substitute a 574 mile haul for a 367 mile haul and a $3.51 rate for a present $5.60 rate. Southern today grosses over $3100. per week more on this 207 mile shorter haul than it would if the restraining order were dissolved. The losses, if any, which will accrue to Southern because of idled standard equipment should be offset by the increased revenues it earns on such constant movements of grain under existing rates.

Mr. Hamilton states, and Southern's brief repeats, that these 500 "Big John" cars were purchased "solely" for use on these proposed rates. It is hard to square this statement with Mr. Brosnan's testimony before the Commission [fol. 199] that 75 of these cars were acquired nearly 2 years before the involved rates were proposed to the Commission, and Vice-President King's testimony that the equipment can be and is being used in moving other commodities.[6] If Mr. Hamilton's statement is accepted at face value, the fact that Southern originally *intended* the cars to be used on the proposed rates certainly does not prevent their use on existing rates nor their use in hauling other commodities. Hamilton's affidavit conflicts with Mr. King's testimony that the jumbo cars were not "to be assigned to grain traffic exclusively" [Bromley, Aff. p. 5].

Mr. Berger and Mr. Sprunger state that their two companies have shipped 211 standard-size cars of grain from Chattanooga via the Southern between the effective date of the restraining order and August 31. Granted that some [fol. 200] of these cars may have been consigned to shippers who cannot unload "Big John" cars, it is inconceivable that at least a part of this grain could not have moved in the more modern equipment if Southern had so desired. Appellants should not be required to protect Southern against self-manufactured losses or against losses which can be prevented simply by the exercise of ordinary business prudence.

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[6] See Bromley Aff., p. 4, 5.

Perhaps Mr. Hamilton refers only to the 500 jumbo cars ordered by Southern after the ICC suspended the proposed rates and he is not including the 75 cars acquired some 2 years before that time. If so, his statement that Southern "has purchased 500 'Big John' heavy loading aluminum 'hopper cars" is grossly misleading. It implies that these 500 cars have been on hand for some time. However, he testified before the Commission on July 5, 1962 that Southern received delivery of 200 cars after the hearing started and delivery of the remaining 300 cars "is to be completed by October 15." (Bromley's Aff., p. 7).

Finally, Appellants submit that upon basic equitable principles they should not be required to make a bond in an amount which will protect Southern from such losses as it may sustain, if any, because some of the new equipment is idled as a result of the restraining order. It is clear that Southern ordered 200 new cars in the fall of 1961 *after* the Commission had made a preliminary finding that the proposed rates would probably be unlawful, *after* the Commission had suspended the rates, and *after* the Commission had placed upon Southern the burden of proving their lawfulness.[7] Months later Southern ordered the remaining 300 cars, only part of which have been delivered, while the Commission was still investigating the probable unlawfulness of the rates in extensive and highly adversary proceedings.[8] Under such circumstances, did not Southern assume the risk that the proposed rates might not go into effect in accordance with Southern's intended schedule? There [fol. 201] seems scant equity in Southern's claim to be reimbursed for 100% of its costs of ownership when the purchases were made in such complete disregard of the question of lawfulness of the rates.

Conclusion

Southern's claim for a higher bond raises numerous and complex factual issues. The rule requiring mitigation of damages requires a showing that the new equipment will, in fact, be forced into idleness because Southern is restrained from charging certain rates on one commodity. It requires a showing that there is and will be *no* grain or other traffic which can be hauled in this new equipment; that, if the rates had not been restrained, optimum, maximum use of the new equipment would have been achieved; and that if such optimum use were achieved Southern's net revenue picture would be brighter than if the new equipment were used to move grain on the existing, more remunerative rates. Southern has not been restrained from using the newer, more modern equipment. It has simply been restrained from charging ridiculously low rates on grain, rates which will earn for Southern only 35% as much revenue per ton mile as the existing rates.

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[7] Bromley Aff., p. 4.

[8] Bromley Aff., p. 7.

[fol. 202] Appellants respectfully submit that Southern has shown no reasonable basis for requiring a bond in excess of Appellants' capabilities and in excess of that required by Judge Gewin and by Mr. Justice Black.

Respectfully submitted,

Arrow Transportation Company, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., City of Guntersville, Alabama, Sirote, Permutt, Friend & Friedman, First Federal Building, Birmingham 3, Alabama, By: Morris K. Sirote; Lovett & Lovett, Benton, Kentucky, By: John C. Lovett, Joe Starnes, Jr., City Attorney, Guntersville, Ala.

Of Counsel: Mcleay, Lynch, Channing & Bernhard, Commonwealth Building, 1625 K Street, N.W., Washington 6, D. C.

[fol. 203] Certificate of Service (omitted in printing).

[fol. 204] AFFIDAVIT OF JAMES F. BROMLEY AS TO RECORD

James F. Bromley, being first duly sworn, deposes and says:

1. That he is employed by the law firm of Macleay, Lynch, Channing and Bernhard, 1625 K Street, N.W., Washington 6, D. C., and in the course of his employment he has made a review and abstract of the transcript of record in Inter-

state Commerce Commission Docket Number I. & S. 7656, *Grain in Multiple-Car Shipments—River Crossings to the South*, as a copy of each volume of that transcript of record has been received from the official reporter and as it has been subsequently corrected in accordance with Rule 1.90 of the General Rules of Practice before the Interstate Commerce Commission.

[fol. 205] 2. That, consequently, he has become familiar with the said transcript of record and knows of his own knowledge that the following excerpts of testimony from the said transcript of record are true, correct and exact; that these excerpts appear in the transcript of said record at the pages shown; and that they have been taken directly from the transcript after it had been corrected in accordance with Rule 1.90 of the General Rules of Practice before the Interstate Commerce Commission.

[fol. 206] EXCERPT FROM TESTIMONY

of

D. W. Brosnan—I. & S. Docket No. 7656

Transcript Page 106, ll. 17-20; January 8, 1962

Q. How many such cars does Southern own at the present time?

A. I think that at the moment we own 78. We have taken orders on 200 at the present time and we will have the 200 additional car ownership in a matter of about six weeks.

[fol. 207] EXCERPT FROM TESTIMONY

of

D. W. Brosnan—I. & S. Docket No. 7656

Transcript Pages 122 and 123, ll. 18-25, 1-6; January 8, 1962

Q. What other service can the cars, the 78 I believe cars that you mentioned, and the 200 that you have on order, what other service can they be used in?

A. Let me make this clear. We bought 75 of these cars over two years ago and we have bought 200 of them this past fall. We have had delivery of three of those 200, which accounts for the 78 that we have now. We have 197 of the 200 yet to come. Let me make that clear first.

Q. Now I want to know what kinds of traffic those cars are capable of hauling in addition to grain traffic?

A. Well, they can haul in addition to grain they can haul the lighter clays, the very light shale and clays that are used in making slick paper. They can haul feeds which are very light, materials of that character.

[fol. 208] EXCERPT FROM TESTIMONY

of

W. M. King—I. & S. Docket No. 7656

Transcript Page 437, ll. 7-13; January 11, 1962

Q. With regard to the equipment, Mr. King, and I refer to it as jumbo equipment, is it to be assigned to grain traffic exclusively?

A. No. We are moving on our railroad many commodities that will use this type of equipment.

Q. On a single carload basis?

A. Generally.

[fol. 209] EXCERPT FROM TESTIMONY

of

A. C. Henderson, I. & S. Docket No. 7656

Transcript Page 11,054, ll. 4-14; June 19, 1962

Q. Have you any general information as to 1961 or 1962 as to what portion of your grain movements have been under single-car rates in the Big John cars?

A. No, sir.

Q. Has the traffic department provided any information at all on that, as regards the traffic consist and the type of equipment in it which moved?

A. I do not have any figures which would indicate what portion of the total movement was in the so-called Big John cars.

I do know that grain moved in those cars. What proportion that was of the total, I don't know.

[fol. 210] EXCERPT FROM TESTIMONY

of

R. S. Hamilton—I. & S. Docket No. 7656

Transcript Page 12,089, ll. 18-24; July 5, 1962.

Q. Has there been any change in the status of those jumbo hopper cars owned by the Southern Railway?

A. Yes. I believe when this hearing started we owned only 75 of them. Since that time we have received delivery on 200 additional and we have 300 more on order. I believe delivery started about the middle of last month and is to be completed by October 15.

[fol. 211] James F. Bromley

District of Columbia) ss.

Subscribed and sworn to before me this 10th day of September, 1962. Yolanda J. De Marco, Notary Public. My Commission expires: Jan. 31, 1963.

[fol. 212] AFFIDAVIT

(Letterhead of Neumond, Inc., 5100 Oakland Avenue,
St. Louis 10, Mo.)

State of Missouri)
City of St. Louis) ss.

Benjamin M. Schulein, being first duly sworn, deposes and says:

He is President of Neumond, Inc., with offices at 120 Merchants Exchange Building, St. Louis, Missouri.

Neumond, Inc., is engaged in the merchandising of grain and related products including alfalfa meal, large quantities of which it ships to points located on the lines of the Southern Railway System in the Southeastern States.

Alfalfa meal is well adapted to handling in covered Hopper railroad cars.

One of the principal points of shipment for alfalfa meal by Neumond, Inc., is Blytheville, Arkansas located on the St. Louis-San Francisco Railway.

Neumond, Inc., has made efforts to secure an increase in the availability of covered Hopper cars for loading at Blytheville, Ark., for shipment to points in the Southeast, such cars not having been available at times in the number required for the most satisfactory handling of the business of Neumond, Inc.

In an effort to secure an additional supply of covered Hopper cars the request was made to the Southern Railway System to make available for this use some of its so-called Jumbo covered Hopper cars. That effort was not successful, officials of the Southern Railway System advising affiant that all of its covered Hopper cars are in assigned service, and that they are in short supply for loading on the lines of the Southern Railway System by Industries located thereon.

The attached copy of letter dated May 2, 1962 to affiant from Mr. C. J. Youngblood, Western Traffic Manager of the Southern Railway System is a true and correct copy of the original letter received by affiant.

Benj. M. Schulein, President
Neumond, Inc.

Subscribed and Sworn to before me this 31st day of August, 1962. Jennie B. Billins, Notary Public. My commission expires June 9, 1964.

[fol. 213] ATTACHMENT TO AFFIDAVIT

(Letterhead of Southern Railway System, Traffic Dept., Chemical Bldg., St. Louis 1, Mo.)

May 2, 1962.
61-D.

Mr. B. M. Schulein,
President, Neumond, Inc.,
120 Merchants Exchange, St. Louis 10, Mo.

Dear Mr. Schulein:

You will recall that we have been handling with our Washington Office for some time to develop if it would be possible to assist the Frisco Railroad in furnishing covered hopper cars to load alfalfa meal at Blytheville, Ark.

We have now been definitely advised by Mr. C. W. Gowl, Assistant Vice-President, Southern Railway, Washington, D. C., that all of our covered hopper cars are in assigned service and it will not be possible for us to assist the Frisco. As a matter of fact, we are actually short of this type of equipment for loading on our own railroad.

Yours very truly,

/s/ C. J. Youngblood
Western Traffic Manager

cc: Mr. Carl Buchheit, Traffic Dept.,
Ralston Purina Company,
835 S. 8th St., St. Louis 2, Mo.

cc: Richland Products Company,
Blytheville,
Ark.

[fol. 214] AFFIDAVIT OF WILLIAM M. BERGER

William M. Berger, being first duly sworn, deposes and says:

He is Branch Manager in charge of the operations of Cargill, Incorporated at Chattanooga, Tennessee, and also in charge of the operations of that company at Guntersvill Alabama.

Cargill, Incorporated is engaged, among other things, in the merchandising of grain in the Southern portion of the United States, where it distributes very substantial quantities of various types of grain. In fact, Cargill is one of the largest, if not the largest, firms actively engaged in shipping grain from the Tennessee River ports of Chattanooga and Guntersville into the Southeast.

In his capacity as Branch Manager, he is in charge of and familiar with the transportation employed in the distribu- [fol. 215] tion of grain from Chattanooga and Guntersville to the customers of Cargill, Incorporated in the Southeast. He is also familiar with the operations of other Cargill elevators, particularly those located at other points in the Southeast.

Since they became available, Cargill has made extensive use of the so-called Jumbo Hopper cars of Southern Railway System for distribution through its Chattanooga facility. From mid-March until the latter part of June of 1962 such cars were in tight supply, and were not made available by Southern to the full extent of their possible use by Cargill. During this period approximately 52 percent of the outbound grain shipments from Chattanooga was via the Southern Railway. Since the latter part of June they have been more readily available and have been used extensively in the outbound haul from Chattanooga via Southern Railway.

During the week ended August 17, 1962, the first full reporting week by Cargill after the initial temporary restraining order became effective, Cargill loaded 52 jumbo hopper cars and 8 standard box and hopper cars of grain for shipment via Southern to points in the Southeast.

During the week ended August 24, Cargill loaded 72 jumbo cars and 6 standard boxcars and hopper cars and during the week ended August 31, it loaded 59 jumbo hopper [fol. 216] cars and 2 standard boxcars for outbound shipment via Southern. These shipments went to various points on the Southern Railway in Georgia and North and South Carolina. He estimates that during the week ended September 6, it will load at least 45 jumbo cars and 6 standard size boxcars and hopper cars. He estimates that the average "turn-a-round" time for jumbo cars handling such shipments is from 9 to 14 days.

Cargill recently has experienced serious shortage of railroad cars for loading at Guntersville, which is served by Appellee Louisville and Nashville Railroad, but not by Southern Railway; Cargill could and would make use of Jumbo Hopper cars for shipments from that point if the Southern had them available and would permit them to be used by the Louisville and Nashville Railroad in such transportation.

As an example of the revenue to Southern Railway System from the employment of these cars for shipments from Chattanooga, Cargill recently has been using Jumbo Hopper cars for fifteen or sixteen carloads per week to Mocksville, North Carolina, a distance of 367 miles via the route of Southern Railway System, at a rate of $5.60 per ton. The proposed rates will not apply from Chattanooga to Mocksville, however. If the proposal were extended to this movement, the rate would be $2.52 per ton and Southern would have to haul over twice as much grain and furnish [fol. 217] twice the rail service in order to earn the same gross revenue it now receives and it now receives virtually 100 percent of this traffic. The existing rate to Mocksville is to be contracted with the proposed rate from Cincinnati, Ohio, of $3.51 per ton for a distance of 574 miles via the route of the Southern Railway System. If the grain moved from Cincinnati to Mocksville on the rates which have been enjoined Southern would be required to haul 60 percent more grain for a 56 percent greater distance in the same equipment in order to earn the same gross revenue that it now earns on the existing rail movement from Chattanooga.

The harvest season for local grain in the Southeast is imminent, and such local grain will be available to Southeastern consumers in substantial quantities until mid-November. Cargill has facilities in eastern North Carolina, where considerable quantities of local grain are produced. These are located at Washington and at Wilson. Cargill would be happy to employ jumbo cars for movement of grain from those facilities to consuming points on Southern Railway System in western North Carolina. However, those facilities of Cargill are located on the Norfolk and Southern Railroad, and thus far Southern Railway System has not made such cars available for the movement from origin on the Norfolk and Southern Railroad to destination on the Southern Railway.

/s/ WILLIAM M. BERGER
William M. Berger

[fol. 218]
State of Tennessee)
County of Hamilton) ss.

Subscribed and sworn to before me, a Notary Public for the State and County aforesaid, this eighth (8th) day of September, 1962. Louise Kill, Notary Public. My Commission expires April 4, 1966.

[fol. 219] AFFIDAVIT OF R. L. SPRUNGER

R. L. Sprunger being duly sworn, deposes and says:

He is General Rail Traffic Manager of Central Soya Company, Inc. located at 300 Fort Wayne Bank Building, Fort Wayne, Indiana. He is responsible for all rail traffic matters and is familiar with the shipment of grain via rail from the company's operations at Chattanooga, Tennessee.

During the period, March 15, 1962 through August 6, 1962, Central Soya Company, Inc. made 181 shipments in "Big John" covered aluminum hopper cars and 1,465 shipments in other hopper cars furnished by and shipped on the Southern Railway System. During the period, August 7, 1962 through September 1, 1962, 18 shipments were made in "Big John" covered aluminum hopper cars and 195 shipments in other hopper cars. These shipments were in cars furnished by the Southern Railway and shipped on the Southern Railway System.

Dated this 5th day of September, 1962.

R. L. Sprunger
General Rail Traffic Manager

State of Indiana)
Allen County) ss.

Subscribed and sworn to before me this 5th day of September, 1962. Elsie Schmidt, Notary Public. My commission expires May 28, 1964.

[fol. 220] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 221]

SUPREME COURT OF THE UNITED STATES

No. 430—October Term, 1962

ARROW TRANSPORTATION COMPANY ET AL., Petitioners,

vs.

SOUTHERN RAILWAY COMPANY ET AL.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S
FILED
SEP 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 430

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company,
John D. Bagwell Farms and Hatchery, Inc.,
a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company,
a corporation,
St. Louis-San Francisco Railway Company,
a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

Sirote, Permutt, Friend
and Friedman
First Federal Building
Birmingham, Alabama

Joe Starnes, Jr.
City Attorney
Guntersville, Alabama

Donald Macleay
Macleay, Lynch, Channing &
Bernhard
1625 K Street, N. W.
Washington 6, D. C.

John C. Lovett
Lovett and Lovett
Benton, Kentucky
Attorneys for Petitioners

Press of Byron S. Adams, Washington, D. C.

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Atlantic Coast Line v. *Macon Grocery Co.*, (C.A. 5, 1909), 166 Fed. 206, *aff'd on other grounds*, 215 U.S. 501 13

Cantlay & Tanzola, Inc. v. *United States*, (S.D. Cal., 1953), 115 F. Supp. 72 8

Coe & Wilson v. *L. & N. R. R. Co.*, (M.D. Tenn. 1880), 3 Fed. 775 12

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Houston Coal and Coke Co. v. Norfolk & Western Ry., (C.C. Va., 1909), 171 Fed. 723 12
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Liggett Co. v. Baldridge, 278 U.S. 105 (1928) 13
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Menacho v. Ward, (S.D. N.Y., 1886), 27 Fed. 529 12
Northern Pacific Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n., (C.A. 9, 1908), 165 Fed. 1 .... 11, 12
Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923) 13
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Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942) 11
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United States v. Michigan Central R. Co., (N.D. Ill., 1903), 122 Fed. 544 12
West India Freight and Steamship Co. v. Seatrain Lines, (C.A. 2, 1948), 170 Fd. 2d 775 11
Wickwire Steel Co. v. N. Y. Central, etc., R. Co., (C.A. 2, 1910), 181 Fed. 316 13

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered August 8, 1962 (App. A) denying petitioners' motion for preliminary injunction pending appeal from an order of the United States District Court for the Northern District of Alabama, Southern Division, which denied petitioners' motion for preliminary injunction (App. B).[1]

OPINIONS BELOW

The District Court issued a Memorandum on August 2, 1962 (R. 73-77, App. C) followed by Findings of Fact, Conclusions of Law and Order on August 3, 1962 (R. 78-82, App. B) denying petitioners' motion for preliminary injunction. Circuit Judge Gewin entered a temporary restraining order on August 3, 1962 (R. 101-103, App. D). On August 8, 1962, United States Circuit Judges Rives and Gewin denied petitioners' motion for injunction pending appeal but continued the restraint for three days (R. 150, App. A).

Thereafter, Mr. Justice Black extended the restraining order pending the filing of this petition for Writ of Certiorari (R. 155, App. E). This order was accompanied by a Memorandum (R. 151-154, App. F).

Later, on August 29, 1962, United States Circuit Judge Rives wrote to counsel stating that the Court of Appeals would pass on the merits of the appeal from the District Court as expeditiously as possible and would not defer such decision on the merits until disposition by this Court of this Petition for Writ of Certiorari (App. G).

At this writing, the Court of Appeals has not issued its decision on the merits. Meanwhile, petitioners are required by Mr. Justice Black's order to file this petition by September 16, 1962. It is likely that a decision on the merits may be forthcoming before this Court can dispose of this petition. Petitioners therefore propose to move for leave to supplement this Petition in order to bring up for review the Court of Appeals' decision on the merits of the appeal from the District Court if that decision is issued shortly and is adverse to petitioners. None of the aforementioned orders or decisions has been officially reported.

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[1] The Appendix to this petition is referred to herein as "App." and the record certified from the courts below is referred to as "R". Petitioners were plaintiffs in the District Court.

JURISDICTION

The order of the Court of Appeals denying petitioners' motion for a preliminary injunction pending appeal from the District Court was entered August 8, 1962 (R. 150, App. A). Mr. Justice Black's order directing petitioners' to file this petition within thirty (30) days was entered August 17, 1962 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the District Court possesses jurisdiction to prevent irreparable injury by ordering the maintenance of the *status quo* in a proceeding pending before the Interstate Commerce Commission, in which the railroads are about to make drastic rate reductions which the Commission suspended upon a finding of reason to believe the rate reductions unlawful, and where the Commission not only has been unable to pass upon their lawfulness with finality but is without power to further prevent the rate reductions from going into effect.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U.S.C. Section 1, et seq) are set forth in Appendix I.

STATEMENT

(a) The Proceedings in the Interstate Commerce Commission

In July 1961, Respondent Southern Railway Company, herein referred to as "Southern", published certain tariff schedules to be effective on August 7, 1961, proposing a new schedule of rail rates on grain from specified Ohio and Mississippi River ports to specified destinations in the Southeast and to intermediate points. The level of these new rates was about 35% of the existing rates. Other railroads, none of whom had any prior knowledge that Southern contemplated this action, immediately published similar rates in order to maintain the competitive position of grain shippers using their lines. Upon complaint, the Commission made a preliminary finding that there was reason to believe that the proposed rates would be unjust and unreasonable and would constitute an unfair competitive practice in contravention of the National Transportation Policy. It suspended the proposed rates for seven (7) months, the maximum period allowed by Section 15(7) of the Act.[2] The Commission then launched a broad investigation into the lawfulness of the proposed rates, and declared the proceedings to be of general transportation importance.[3] Hearings began on January 8, 1962. Meanwhile, Southern, because of delays occasioned by it, voluntarily extended the suspension period from March 9, 1962 to August 7, 1962. All other railroads concurred.

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[2] App. I. "Act" herein refers to the Interstate Commerce Act, 49 U.S.C. Section 1, et seq.

[3] The proceedings before the Commission are in ICC I & S Docket 7656—*Grain in Multiple Car Shipments, River Crossings to the South.*

Hearings before the Commission were still in progress on July 7, 1962, which, because of the statutory requirement of 30 days notice of the Commission's orders, was the last day the Commission could have prevented the rates from going into effect by ordering them cancelled. Protestants' prior motion that the Commission cancel the rates because of failure of Southern's testimony in chief to prove their lawfulness was denied on the ground that the Commission lacked power to consider such relief until the hearings were completed. Since the Commission was powerless to prevent the rates from going into effect on August 7, 1962, and since Southern was still presenting rebuttal evidence before the Commission, the barge lines and others requested Southern voluntarily to postpone the effective date of the rates until the Commission could issue a final order on their lawfulness. All other railroads agreed to such postponement provided Southern would agree. Southern refused.

(b) The Proceedings in the District Court

When it became clear that Southern would not voluntarily extend the effective date of the proposed rates, and while Southern was presenting rebuttal testimony before the Commission, petitioners on July 27, 1962, filed their verified complaint in District Court (R. 1-13), resting jurisdiction generally upon the diversity statute (28 U.S.C., Section 1332), as well as upon the federal question statute (28 U.S.C., Section 1331), and the law regulating commerce statute (28 U.S.C., Section 1337). The complaint, alleging irreparable injury and absence of adequate legal remedy, was accompanied by a motion that Southern and three other railroads be enjoined from placing the proposed rates into effect until the Commission entered a final order in the investigation proceedings (R. 14-16). Supporting affidavits were filed showing that the proposed rates were so low that Arrow Transportation Company, a competing common carrier barge line, could not compete even if it moved the grain free, and that if the rates became effective, Arrow would be forced to surrender its common carrier certificate, causing irreparable injury to itself and to shippers and communities geared to its services (R. 45-64).

Southern promptly filed answer (R. 67-72), motion to dismiss (R. 65), and counter affidavits (R. 18-44). The other defendant railroads entered appearances but filed no responsive pleadings. Hearing was held in District Court on August 1, 1962, and on the next day the District Judge filed his Memorandum opinion stating that "the ends of justice would be best served by granting temporary injunctive relief" but that "I find myself powerless to grant the relief sought", without citing any reasons or authority for his lack of jurisdiction (R. 73-77, App. C). The following day, August 3, Findings of Fact, Conclusions of Law and Order were entered establishing requisite diversity and amount, jurisdiction of the parties, grave danger of irreparable injury, and absence of adequate legal remedy. He concluded, however, that he lacked jurisdiction to grant relief (R. 78-82, App. B). He denied, on jurisdictional grounds, petitioners' motion for a stay pending appeal (R. 85, App. H), and petitioners promptly appealed (R. 86).

(c) The Proceedings in the Court of Appeals

On the same day, August 3, 1962, petitioners applied for and, after hearing, obtained from United States Circuit Judge Gewin a temporary restraining order, restraining Southern and the other three railroads from placing the proposed rates into effect before August 8, and fixing a $10,000 bond (R. 101-103, App. D). Only Southern opposed this relief. Petitioner's motion for an injunction to preserve the *status quo* pending appeal from the District Court was heard by United States Circuit Judges Rives and Gewin on August 8. Again Southern was the only railroad opposing the requested relief. Solely on jurisdictional grounds, and without citing authority, that Court denied the injunction pending appeal but extended the restraining order until August 11 to accord petitioners an opportunity to seek relief in this Court (R. 150, App. A).

(d) The Prior Proceedings in This Court

On August 10, petitioners petitioned this Court to extend the restraining order pending their filing this Petition for Writ of Certiorari. After Southern, with concurrence of all other railroads, voluntarily extended the effective date from August 11 to August 18, Mr. Justice Black on August 17 handed down his memorandum and order granting the relief prayed, allowing 30 days for the filing of this Petition and fixing the amount of the bond at $10,000 (R. 151-155 App. E, F).

(e) Further Proceedings in Court of Appeals

On August 27, Southern petitioned the Court of Appeals to require these petitioners to file a bond in the amount of $220,600.00 (R. 150-166). Petitioners answered on August 30 (R. 167-173); however, United States Circuit Judge Rives meanwhile wrote to the parties on August 29 stating that the Court of Appeals would decide the merits of the appeal promptly and would defer hearing on the bond until after that decision, indicating that any further bond required might be in a prohibitive amount (App. G). At this writing, the Court of Appeals has not handed down its decision on the merits of the appeal from the District Court. It is expected momentarily.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' tentative determination that the District Court was without jurisdiction to prevent irreparable injury by maintaining the *status quo* of the proceedings before the Commission conflicts with the only two reported decisions in which similar relief was asked and granted. They are *Pacific Inland Tariff Bureau* v. *United States*, (D.C. Ore., 1955), 129 F. Supp. 472, and *Cantlay & Tanzola, Inc.* v. *United States*, (S.D. Cal., 1953), 115 F. Supp. 72, both being statutory 3-judge court decisions which were not appealed. Each case held that the Court possessed jurisdiction. No case to our knowledge has directly held that jurisdiction is lacking. This important question of federal law has not been but should be settled with finality by this Court. Unless it is settled, Southern will be free to cut rates so as to destroy barge competition and monopolize the traffic, thus emasculating the National Transportation Policy before the Commission can pass upon the lawfulness of the means used to accomplish it. The Commission and the Courts will be powerless to prevent such destruction. That this narrow but crucial question is presented in a case declared to be of general transportation importance warrants immediate settlement of this issue by this Court.

The Courts below apparently based their lack of jurisdiction on their interpretation that Section 15(7) of the Act, by implication, ousted equity's jurisdiction to restrain unlawful and destructive reductions in rates which will inflict irreparable damage. If the Courts are powerless, common carriers will be free to engage at will in unlawful, monopolistic competitive practices, contrary to the public interest and to declared national policy.

ARGUMENT

I

The Writ Should be Granted to Prevent Defeat of the National Transportation Policy

The District Court made every finding necessary to grant the *status quo* injunction except jurisdiction of the subject matter. Specifically, it found requisite diversity and amount, irreparable injury, absence of adequate legal remedy, and that "the ends of justice would be best served by granting temporary injunctive relief" (R. 73-77, App. C). Southern has not appealed from those findings and we will not reargue those facets of the case. Suffice it to say that the rates proposed by Southern, if they become effective, will swiftly destroy barge movement of grain on the Tennessee River, a natural artery connecting the grain surplus area of the Midwest with the grain deficit area of the Southeast. It will do so because the rate reductions are so drastic the barge lines will be unable to compete in reaching many major Southeastern markets even if they haul the grain free.

If the Writ is denied, the rates will automatically go into effect before the Commission can pass upon their lawfulness. The unlawfulness of the rates will not be established until after irreparable injury has occurred because the Commission decision is still months away.[4] Thus the National Transportation Policy, which directs preservation of the inherent advantages of all modes of transportation and denounces unfair or destructive competitive practices, will be defeated before the Commission can implement it.

> *National Transportation Policy,* note preceding 49 U.S.C. Section 1 (App. I)
>
> *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56 (1956)
>
> *I.C.C.* v. *Mechling,* 330 U.S. 567 (1947)
>
> See also: *Arrow Transportation Co.* v. *United States,* (N.D. Ala., 1959), 176 F. Supp. 411, *aff'd per curiam,* 361 U.S. 353 (1960).

What is involved is not a barge movement made noncompetitive by technological improvements in rail transportation, but a merciless attempt to destroy competition before the unlawfulness of the means used can be adjudicated. Granting the Writ is essential to the preservation of the integrity of the National Transportation Policy.

II

The Writ Should be Granted to Aid the Jurisdiction of the Commission

The Commission has made the essential preliminary findings and has exercised and exhausted its jurisdiction to prevent the rates from going into effect *pendente lite.* The seven month suspension power has been invoked and spent. Any future determination by the

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[4] Hearings were concluded August 29. Briefs are due November 5. There are 15,815 pages of transcript and 765 exhibits.

Commission that the rates are unlawful will be largely nugatory because many of the victims will have long since ceased to breathe. Judicial intervention to maintain the *status quo* will be in aid of the Commission's jurisdiction and will enable it to make an effective decision.

Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, 316 U.S. 4 (1942)

Isbrandtsen Co. v. *United States*, (S.D. N.Y., 1948), 81 F. Supp. 544

West India Freight and Steamship Co. v. *Seatrain Lines*, (C.A. 2, 1948), 170 F. 2d 775

Pennsylvania Motor Truck Ass'n., et al., v. *Port of Philadelphia Marine Terminal Ass'n.*, (E.D. Pa., 1960), 183 F. Supp. 910

Amarillo-Borger Express v. *United States*, (N.D. Tex., 1956), 138 F. Supp. 411.

Note: 49 *Columbia Law Review*, 1124.

III

The Writ Should be Granted to Establish That Equity's Inherent Power to Restrain Destructive Rate Practices, Preventing Irreparable Injury, Survived Enactment of Section 15(7) of the Interstate Commerce Act

Federal equity courts possess inherent power to prevent irreparable injury by restraining railroads from engaging in destructive rate practices. They possessed this power before the Act was adopted.

In *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Ass'n.*, (C.A. 9, 1908), 165 Fed. 1, 5, the court said:

> "Prior to its [Interstate Commerce Act] enactment, the equitable jurisdiction to enjoin excessive charges and discriminations by common carriers

> on the ground that the wrong was a constantly recurring one, for which there was no adequate remedy at law, was generally recognized (citing cases)." Accord: *Coe & Wilson* v. *L. & N. R.R. Co.* (M.D. Tenn., 1880), 3 Fed. 775; *Menacho* v. *Ward* (S.D. N.Y., 1886), 27 Fed. 529.

They possessed this power after the Act was enacted giving the Commission primary jurisdiction over rate matters, *provided* such judicial intervention did not interfere with or frustrate the Commission's primary jurisdiction.

In *Northern Pacific Ry. Co., supra,* the court said:

> "The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the Commission shall have had time and opportunity to adjudge the question of its unreasonableness. *Such has been the decision of the federal courts in every case in which the question has arisen.*" [p. 8 emphasis added].
>
> Accord: *Tift* v. *Southern Ry. Co.,* (S.D. Ga., 1903), 123 Fed. 789, *aff'd,* 206 U.S. 428
>
> *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. Ry.,* (D.C. S.D. 1907), 156 Fed. 160
>
> *M. C. Kiser Co.* v. *Central of Ga. Ry. Co.,* (N.D. Ga., 1907), 158 Fed. 193
>
> *United States* v. *Michigan Central R. Co.,* (N.D. Ill., 1903), 122 Fed. 544
>
> *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Ass'n., supra*
>
> *Union Pacific R. Co.* v. *Oregon and Washington Lumber Mfrs. Ass'n.,* (C.A. 9, 1908), 165 Fed. 13.
>
> Contra: *Houston Coal and Coke Co.* v. *Norfolk & Western Ry.,* (C.C. Va. 1909), 171 Fed. 723

Wickwire Steel Co. v. *N. Y. Central, etc., R. Co.*, (C.A. 2, 1910), 181 Fed. 316

Atlantic Coast Line v. *Macon Grocery Co.*, (C.A. 5, 1909), 166 Fed. 206, [Circuit Judge Shelby dissenting], *aff'd on other grounds*, 215 U.S. 501.

This equity power survived the enactment of the Mann-Elkins Act (June 18, 1910, *c.* 309, sec. 12, 36 Stat. 551), which first vested the Commission with suspension authority, and the Transportation Act of 1920 (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484), which added to Section 15(7) a statutory remedy for persons damaged by *increases* in rates but provided no remedy for persons irreparably injured by *decreases* in rates made effective at the end of the suspension period and later declared unlawful.

IV

The Writ Should be Granted to Protect Petitioners' Property from Being Taken Without Due Process of Law

A business or occupation is property within the protection of the due process clause, *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* v. *Corporation Comm'n.*, 278 U.S. 515, 519-20 (1929).

If equity cannot enjoin unlawful rate decreases after the Commission has exercised and exhausted its jurisdiction to suspend the rates *pendente lite*, petitioners' businesses will be destroyed without administrative or judicial adjudication of the lawfulness of the means used in such destruction. The Act should not be construed so as to raise these grave constitutional difficulties.

Oklahoma Natural Gas Co. v. *Russell*, 261 U.S. 290, 293 (1923)

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U.S. 196, 201, 204-05 (1924)

Anniston Manufacturing Co. v. *Davis*, 301 U.S. 337, 351-352 (1937)

Pacific Inland Tariff Bureau v. *United States*, *supra*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Donald Macleay
Macleay, Lynch, Channing & Bernhard
1625 K Street, N. W.
Washington 6, D. C.

John C. Lovett
Lovett and Lovett
Benton, Kentucky

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend and Friedman
First Federal Building
Birmingham, Alabama

Joe Starnes, Jr.
City Attorney
Guntersville, Alabama

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARROW TRANSPORTATION COMPANY, a corporation, ET AL.,
Appellants,

versus

SOUTHERN RAILWAY COMPANY, a corporation, ET AL.,
Appellees.

Appeal from the United States District Court for
the Northern District of Alabama
(Southern Division)

Order

Before RIVES and GEWIN, Circuit Judges.

PER CURIAM:

The Court considers that there is no reasonable prospect that the appellants will ultimately be successful upon this appeal for the reason that the district court was without jurisdiction, as more fully set forth in that Court's opinion.

The motion for injunction pending appeal is therefore denied, but, in order to give the appellants a reasonable opportunity to seek further relief before the Supreme Court or a Justice thereof, the temporary restraining order heretofore entered in this cause is continued in force to and including Saturday, August 11, 1962, and at the end of that day said temporary restraining order shall expire.

Filed Aug. 8/62

/s/ R. T. RIVES, *Judge*

/s/ RICHARD T. RIVES
/s/ WALTER P. GEWIN
U. S. Circuit Judges

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, D/B/A O. J. WALLS COMPANY,
JOHN G. BAGWELL FARMS & HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation,
Plaintiffs

vs.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Defendants

Findings of Fact, Conclusions of Law and Order

This cause came on to be heard on August 1, 1962, on motion and prayer of plaintiffs for a preliminary injunction. Defendant Southern Railway Company having filed motion to dismiss and answer appeared by counsel. Defendant Louisville & Nashville Railroad Company appeared by counsel and waived prior service of the complaint and notice of the time of hearing. Defendants St. Louis-San Francisco Railway Company and Seaboard Air Line Railroad Company appeared by counsel and waived service and notice of hearing. The Tennessee Valley Authority appeared by its General Counsel as *amicus curiae* in support of plaintiffs' motion.

The application was heard on the verified complaint and answer and on affidavits filed on behalf of plaintiffs and of defendant Southern Railway Company and on arguments of counsel. The court handed down its memorandum at 2:00 P.M., on August 2, 1962.

The court makes the following findings of fact:

1. Plaintiffs and defendants are parties to a proceeding now pending before the Interstate Commerce Commission entitled Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South*. Plaintiffs seek in this court to maintain the status quo pending a final Commission decision on the merits in that proceeding.

2. The averments contained in paragraph II-A of the complaint are true.

3. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

4. The averments in paragraph III(a), (b), (c) and (e) of the complaint are true, and the averments in the first sentence of paragraph III(d) are true. The City of Guntersville is interested in this action for the reason that it believes that its grain industry is in great jeopardy in the event the tariff schedules under investigation by the Commission in I. & S. Docket 7656 became effective, and believes that same will endanger the prosperity, welfare and common good of its citizens.

5. During the year 1961 the defendants published tariff schedules proposing to reduce their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the southeast, which rates, according to the verified complaint filed as an affidavit herein and other affidavits filed herein, will be substantially lower than existing rates.

6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "there is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive

competitive practices in contravention of the National Transportation Policy * * * ", and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.

7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to extend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.

8. The tariff schedules published by the defendants which are currently under investigation by the Commission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a court of competent jurisdiction.

9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

CONCLUSIONS OF LAW

1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

WHEREFORE, it is hereby ORDERED:

1. That the motion for a preliminary injunction and a temporary restraining order be and the same is hereby denied.

2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied.

This the 3rd day of August, 1962.

C. W. ALLGOOD
United States Judge

APPENDIX C

Memorandum

During the afternoon of Friday, July 27th, last, Judge Grooms and attorneys representing plaintiffs in this case discussed same with me briefly. It was explained to me that this case was one of great and vital importance to all parties concerned, that time was of the essence. Due to the fact that Judge Lynne was on vacation and that Judge Grooms had scheduled his vacation to begin August 1st, the purpose of this conference was to see if my August docket, which is unusually heavy with work, could be interrupted and rescheduled so that an early hearing could be set on motions for preliminary injunction or other relief. At that time I found the earliest date available on my calendar to be August 13th and agreed to set aside my planned work for that day so that this matter might be heard, if necessary.

A complaint was filed by plaintiffs on July 27th. On August 1st a motion for preliminary injunction was filed. Answer together with motion to dismiss was filed on August 1st by defendants.

On the morning of July 30th a conference was arranged in chambers attended by attorneys representing plaintiffs, and by attorneys representing the Southern Railroad, one of the defendants in this case. In a general discussion it was agreed that due to the expiration of the suspension of the proposed rates pursuant to Title 49, U.S.C., Section 15(7) of the Interstate Commerce Act, an early hearing was most important and necessary. It was then agreed that the Court would set aside its schedule for August 1st and set this case together with all motions on that date.

Another conference was held in chambers during the afternoon of July 31st, called by counsel for plaintiffs, for the purpose of advising the Court that proper service had not been obtained on all defendants and to request that the hearing be reset for August 13th. The defendants being represented at the conference, it was agreed that due to the close time element trial would be had as originally planned on August 1st.

After some discussion I indicated to counsel for plaintiffs that I seriously doubted that this Court has jurisdiction of the subject matter and that at that time, without having had time to properly research the question and with only a bare outline of the facts involved in the case, I was not convinced that the Court should grant the injunctive relief sought.

In the brief time allowed I have been unable to find authority that would remove the doubt as to jurisdiction from my mind. The cases so ably cited by counsel for plaintiffs in briefs and in brilliant oral arguments do not help. To me there are some important factors contained in those cases not found in this case. While the opinion of Judge Lynne, and I know of no Judge whose opinion would have more weight with me, would be most helpful as to the subject matter in this case should the Court have jurisdiction, his opinion in *Arrow Transportation Company* v. *United States of America and others*, 176 Fed. Supp. 411, does not help me on the question of jurisdiction in this case. This is true of the other cases cited by plaintiffs.

Defendants, relying strongly on *The Great Northern Railway Company* case, 281 U.S. Reports 412, have also failed to offer authority that completely satisfies the Court on the question of jurisdiction in this case. Arguments of counsel, however, together with the Court's research have continued and increased the Court's doubt as to jurisdiction.

Since hearing the oral arguments in this case presented brilliantly by learned counsel and after diligent research and as thorough study of briefs as time would allow, I have come to the conclusion, and it is my judgment, that this Court does not at this time have jurisdiction of the subject matter and is without jurisdiction to grant the relief sought in the complaint.

At the same time I am of the opinion that there may be grave danger that irreparable injury loss or damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in conference strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.

I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 49, Section 8, of the Interstate Commerce Act. Once the Commission renders a decision in the case the parties have adequate and well-defined remedies at law; therefore, I have convinced myself that should this Court have jurisdiction of this matter, it should consider all of these matters most carefully and deliberately before denying injunctive relief to plaintiffs. At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case.

The Court requests counsel for defendants to submit findings of fact, conclusions of law and order at the earliest possible date.

Dated this the 2nd day of August, 1962.

C. W. Allgood
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, *Appellants*

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, *Appellees*

Temporary Restraining Order

This cause coming on to be heard on the motion of the plaintiffs-appellants for a temporary restraining order; and due notice having been given to the defendants-appellees and all parties having been represented by counsel present in court who presented arguments for the respective parties and the Court having before it and having considered the record in the cause and having considered the arguments of counsel, portions of the record in the proceedings before the United States District Court for the Northern District of Alabama, Southern Division, and being fully advised in the premises and of the equities involved, it finds that the District Court concluded that it was without jurisdiction in the premises and that the District Court further found:

> "At the same time I am of the opinion that there may be grave danger that irreparable injury loss or damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in confer-

> ence strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.
>
> "I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 59, [sic] Section 8, of the Interstate Commerce Act."

It appears to this Court from the record that the defendants-appellees are about to apply to rail transportation of grain the tariff schedules published by them which are currently under investigation by the Interstate Commerce Commission, Docket No. I & S 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, which will cause immediate irreparable injury, loss and damage to the plaintiffs-appellants in that the plaintiffs-appellants will lose very substantial amounts of freight traffic and will be irretrievably deprived of substantial freight revenues; and an appeal having been taken by the plaintiffs-appellants to the United States Court of Appeals for the Fifth Circuit from the order, judgment and decree of the United States District Court for the Northern District of Alabama, Southern Division:

Now, THEREFORE, it is hereby ORDERED and DECREED:

1. That pending further order of this Court, each and all of the defendants-appellees, their respective officers, agents, servants, representatives, employees, attorneys, and successors and all other persons in active concert or participation with them be, and they hereby are temporarily restrained and enjoined from directly or indirectly applying to the rail transportation of grain the tariff schedules published by them which are currently under investigation by the Interstate Commerce Commission in Docket No. I & S 7656—*Grain in Multiple Car Shipments—River Crossings*

to the South, until 11 o'clock a.m. on Wednesday, August 8, 1962, and for such period of time thereafter as may be required by a panel of this Court to hear, determine and pass upon the motion of the plaintiffs-appellants for a temporary restraining order.

2. The plaintiffs-appellants are ordered and directed to file their bond, together with corporate surety, to be approved by the Court, in the sum of $10,000.00, conditioned for the payment of such costs, expenses and damages as may be incurred or suffered by any of the defendants-appellees herein, in giving notice and information of this order, but not including loss of revenue resulting from the issuance of this order.

3. Said motion is set for hearing before a panel of this Court in the Courtroom of the United States Court of Appeals for the Fifth Circuit, Montgomery, Alabama, at 11 o'clock a.m. on Wednesday, the 8th day of August, 1962.

4. Said hearing shall be upon the record certified upon appeal from the District Court of the United States for the Northern District of Alabama, Southern Division, and upon typed briefs, at least four legible copies to be filed.

DONE at Tuscaloosa, Alabama at 6:40 p.m. this the 3rd day of August, 1962.

/s/ WALTER P. GEWIN
United States Circuit Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1962

Arrow Transportation Company, et al., *Petitioners*,

vs.

Southern Railway Company, et al.

Order

Upon Consideration of the application of counsel for petitioners and of the opposition of the respondents thereto,

It Is Ordered that the temporary restraining order of the United States Court of Appeals for the Fifth Circuit of August 3, 1962 be, and the same is hereby, extended pending the presentation to and disposition by this Court of a petition for writ of certiorari to review the decision of said Court of Appeals of August 8, 1962 denying an injunction pending appeal. Such a petition for writ of certiorari shall be filed within thirty (30) days from this date.

The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. The conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond and when approved, it shall be filed with the Clerk of the Court of Appeals.

(s) Hugo L. Black
Associate Justice of the Supreme
Court of the United States.

Dated this 17th day
of August, 1962.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

ARROW TRANSPORTATION COMPANY, ET AL., *Applicants,*

v.

SOUTHERN RAILWAY COMPANY, ET AL.

Application for Extension of Temporary Restraining Order

[August 17, 1962.]

MR. JUSTICE BLACK.

This is an application for extension of a temporary restraining order granted by United States Circuit Judge Gewin on August 3, 1962, and temporarily continued by Circuit Judges Rives and Gewin on August 8, 1962. While applicants also ask in the alternative for "injunctive relief," this need not be considered because of my conclusion that they are entitled to have the temporary restraining order extended.

The complaint in the District Court was for an injunction to restrain the defendant railroads from putting into effect a reduction in railway rates for carrying grain in interstate commerce. The reduction was published in a tariff schedule filed with the Commission under authority of § 6(1) of the Interstate Commerce Act, 49 U.S.C. § 6(1). Under § 15(7) of that act the Commission can suspend such new rates for a maximum seven months' period pending hearings on their lawfulness, but if hearings are not completed within seven months the proposed rates "shall go into effect at the end of such period . . . ." Finding that the rates here involved might be "unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy," the Commission suspended the proposed tariffs but failed to complete its hearings and enter a final order as to the lawfulness of the rates within the seven month period.

After a brief voluntary suspension by the railroads, the plaintiffs brought this proceeding in the District Court for an injunction, invoking jurisdiction under 28 U.S.C. § 1331, the general federal question provision, § 1332, the diversity provision, and § 1337, which grants jurisdiction for cases arising under federal acts regulating commerce or protecting it against restraints and monopolies. The complaint shows diversity and federal questions and also charges the defendant railroads with conspiracy to violate the antitrust laws and with seeking to reduce rates so drastically that they would be below costs of transportation and would in some instances be below combined railroad-barge rates even if barges carried the grain substantially or wholly free. This latter consequence, it was charged, violates the policy declared by Congress and several times sustained by this Court designed to secure for barge transportation all inherent advantages it has which enable it to transport commodities cheaper than railroads. See note preceding 49 U.S.C. § 1; *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56 (1956); *I. C. C.* v. *Mechling*, 330 U. S. 567 (1947). See also *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959).

The District Judge, after hearings and arguments, found that there was grave danger that putting the new rates into effect would inflict irreparable damages on the plaintiffs and that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time . . . ." He nevertheless refused to grant relief on the ground that he was without jurisdiction "to enjoin or suspend the effectiveness of rates published by common carriers and subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates." This lack of jurisdiction was apparently based on the court's interpretation of § 15(7) as not only depriving the Commission of jurisdiction to suspend rates longer than seven months but also as completely ousting the jurisdiction of a federal court to grant any kind of relief from such rates, however unlawful, unreasonable, and unjust they might be and however deliberately destructive of barge competition.

The Court of Appeals refused to grant an injunction pending appeal by the plaintiffs because it believed that there was "no reasonable prospect" that the plaintiffs would "ultimately be successful" in reversing the District Court's holding that it had no jurisdiction. The Court of Appeals nevertheless continued Judge Gewin's temporary restraining order to give plaintiffs the opportunity to seek relief from this Court "or a Justice thereof."

I am not so sure as the judges of the Court of Appeals that plaintiffs are bound to fail in obtaining review by this Court of the crucial question of the District Court's jurisdiction. This Court has never decided that § 15(7) must be given an interpretation which so substantially destroys the jurisdiction of federal courts to restrain unlawful conduct which inflicts irreparable damage. The consequence is that I think the plaintiffs are entitled to have the temporary restraining order issued by the Court of Appeals extended in order to maintain the *status quo* pending final action in this Court on the question of the District Court's jurisdiction.

The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated grain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting from the issuance of its order. I agree that this bond is sufficient. If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations.

The temporary restraining order of the Court of Appeals is hereby extended, pending the presentation to this Court of a petition for writ of certiorari to review the decision of the Court of Appeals denying an injunction pending appeal, and pending final consideration and action by this Court on that petition. Plaintiffs are directed to file such petition within 30 days from the date of this order.

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

Richard T. Rives
Judge
Montgomery 2, Alabama

August 29, 1962

Messrs. Sirote, Permutt, Friend & Friedman
First Federal Building, Second Floor
Birmingham 3, Alabama

Messrs. Cabaniss & Johnston
First National Bank Bldg., Ninth Floor
Birmingham 3, Alabama

Messrs. Lange, Simpson, Robinson & Somerville
1023 Frank Nelson Building
Birmingham, Alabama

Re: Arrow Transportation Co., et al. v. Southern Railway Co., et al.

Gentlemen:

We thank counsel for their responses to our letter of August 23 asking their views as to whether we should delay decision on the merits of this appeal. We have also received from counsel for the appellees a petition for further bond by appellants in this case, with a request for a hearing on that petition. We Judges have consulted among ourselves upon the most appropriate procedure.

If we should adhere to the opinion expressed in our order of August 8 that the district court had no jurisdiction of the subject matter, it may be that any further bond required of appellants would be in a prohibitive amount, such as would practically deny relief. While Mr. Justice Black has directed the plaintiffs to file a petition for certiorari to review our decision denying an injunction pending appeal, it is still uncertain whether the Supreme Court will grant such a petition. In the event we should adhere to our original view, it seems to us more likely that the Supreme Court might grant a petition for certiorari from the decision on the merits. In view of the tremendous losses suffered by one side or the other from further delay or a denial of further delay, we have reluctantly decided that we should dispose of the appeal on the merits before hearing the petition of the Southern Railway Company for the requirement of further bond. We will give this matter precedence and place it ahead of the large backlog of cases facing us, and hope to be able to enter a decision on the merits of the appeal as soon as we reasonably can.

That decision will materially effect any action on the petition of Southern Railway Company for the requiring of further bond by the appellants. A hearing on that petition will therefore be postponed for the short time necessary for this Court to reach a decision on the merits.

Sincerely yours,

Richard T. Rives
Richard T. Rives
United States Circuit Judge.

RTR/ef

cc: Honorable Warren L. Jones
Honorable Walter P. Gewin

cc: Honorable Edward W. Wadsworth, *Clerk*
New Orleans, Louisiana

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

ARROW TRANSPORTATION COMPANY, a corporation
O. J. WALLS, d/b/a O. J. WALLS COMPANY
JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation
CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, a corporation
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation
SEABOARD AIRLINE RAILROAD COMPANY, a corporation
Defendants.

Order Denying Stay Order Pending Appeal

This matter coming on to be heard upon the application by the Plaintiffs for a Stay Order pending appeal, pursuant to the provisions of Rule 62 (c) of the Federal Rules of Civil Procedure, and the Court having considered the same, the Court finds that, for the reasons set out in the Order denying the Plaintiffs' application for a temporary injunction this day entered in this cause, the Court is without power or jurisdiction to exercise discretion to grant the relief prayed for in this Motion, and that the same should be denied.

It is, therefore, by the Court, ORDERED that the application for a Stay Order pending appeal before the Circuit Court of Appeals be, and the same is hereby denied.

(2) This Order shall be without prejudice, however, to the right of the Plaintiffs to make a similar application for relief before the Court of Appeals, pursuant to the

provisions of Rule 62 (g) of the Federal Rules of Civil Procedure.

Done and Ordered this 3rd day of August, 1962.

C. W. Allgood
District Judge

APPENDIX I

National Transportation Policy

Interstate Commerce Act, note preceding Section 1, 49 U.S.C., Section 1.

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act, Section 15(7), 49 U.S.C., Section 15(7).

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate,

fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decison of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

PETITIONERS' MOTION FOR LEAVE TO SUPPLEMENT THEIR PETITION FOR WRIT OF CERTIORARI AND THE CERTIFIED RECORD, AND SUPPLEMENTAL PETITION

DONALD MACLEAY
Macleay, Lynch, Channing & Bernhard
1625 K Street, N. W.
Washington 6, D. C.

JOHN C. LOVETT
Lovett and Lovett
Benton, Kentucky

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend and Friedman
First Federal Building
Birmingham, Alabama

JOE STARNES, JR.
City Attorney
Guntersville, Alabama

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 430

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company,
John D. Bagwell Farms and Hatchery, Inc.,
a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company,
a corporation,
St. Louis-San Francisco Railway Company,
a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents

PETITIONERS' MOTION FOR LEAVE TO SUPPLEMENT THEIR PETITION FOR WRIT OF CERTIORARI AND THE CERTIFIED RECORD

Petitioners move the Court for leave to supplement their Petition for Writ of Certiorari and the certified record from the Court below in the manner hereinafter shown and in support thereof state:

1. At the time the original petition was prepared, petitioners were awaiting a decision of the Court of Appeals on the merits of petitioners' appeal from the

District Court. That decision was handed down on September 7, 1962. Petitioners received notice of this action on September 11, 1962, after draft of the original petition was in the hands of the printer. Counsel charged with preparation of the petition did not have access to a copy of the decision until September 12—too late to revise the petition and to supplement the certified record from the Court below and still make seasonable filing of the petition as required by Mr. Justice Black's order of August 17, 1962.

2. The Court of Appeals has decided the essential issue adverse to petitioners and has entered a final order affirming the District Court judgment but staying issuance of a mandate of affirmance until September 28 to afford petitioners an opportunity to seek a Writ of Certiorari from this Court.

3. Supplementing the petition and the record will enable this Court to review the final order of the Court of Appeals and to resolve with finality the essential issue involved.

WHEREFORE, petitioners move the Court for leave to supplement their Petition for Writ of Certiorari in the manner hereinafter shown, and to file the certified supplemental record of the Court of Appeals which is lodged herewith.

DONALD MACLEAY
Macleay, Lynch, Channing & Bernhard
1625 K Street, N. W.
Washington 6, D. C.

JOHN C. LOVETT
Lovett and Lovett
Benton, Kentucky

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend and Friedman
First Federal Building
Birmingham, Alabama

JOE STARNES, JR.
City Attorney
Guntersville, Alabama

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

PETITIONERS' SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit affirming judgment of the United States District Court for the Northern District of Alabama, Southern Division, denying petitioners' motion for preliminary injunction.

OPINION BELOW

The judgment of the Court of Appeals is shown in Supplemental Appendix A. The opinion below is shown in Supplemental Appendix B and has not been officially reported.[1] All other opinions below are shown in the original petition.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court was entered on September 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

The question presented is the same as that shown on page 3 of the original petition.

STATUTE INVOLVED

The statute involved is the same as that shown on page 3 and copied in Appendix I of the original petition.

STATEMENT

There have been proceedings in the Court of Appeals since the original petition was prepared. On September 7, that Court handed down its final opinion and judgment on the merits of the appeal from the District Court (Supp. R. 1-13, 14; Supp. App. A, B). It affirmed the judgment of the District Court denying petitioners' motion for a preliminary injunction and stayed issuance of mandate of affirmance for 21 days (Supp. R. 1-13, Supp. App. B). Petitioners received the opinion on September 11. On September 13, petitioners filed in the Court of Appeals their supplemental answer to Southern Railway Company's demand that petitioners make a $220,600.00 damage bond (Supp. R. 15). The demand for a higher bond has been set for hearing before a two-judge panel of the Court of Appeals at Montgomery, Alabama, on September 20, 1962.

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[1] The Appendices to the original petition are referred to as "App." The Appendix to this supplement is referred to as "Supp. App.". The Supplemental Record certified from the Court below is referred to as "Supp. R.".

REASONS FOR GRANTING THE WRIT

The Court of Appeals has construed Section 15(7) of the Interstate Commerce Act (49 U.S.C., Section 15(7), App. I) as rendering the federal equity courts powerless to enjoin rate reductions *pendente lite* at the end of the seven month period of suspension even though failure to enjoin threatens petitioners with bankruptcy, defeats the National Transportation Policy, and obstructs "the ends of justice" which the District Court found would best be served by such extension (R. 76, App. C).

This Court has never construed the Act as imposing impotence upon the equity court in the narrow situation presented here. The Court of Appeals' interpretation conflicts with *Pacific Inland Tariff Bureau* v. *United States,* (D.C. Ore. 1955), 129 F. Supp. 472, in which the District Court, in an action essentially the same as that presented here, enjoined rate decreases and extended the suspension period from December 8, 1953, until the final reviewable order of the Commission was entered on April 19, 1954. And in *Cantlay & Tanzola, Inc.* v. *United States,* (S.D. Cal. 1953), 115 F. Supp. 72, the court preserved the *status quo* by enjoining rate decreases, thus extending the suspension period until the Commission could pass upon the competing carriers' petition for reconsideration.

The decision of the Court below, if permitted to stand, will enable carriers to destroy competition, monopolize traffic, and inflict irreparable injury upon shippers and localities by the simple device of publishing rates so destructive, so discriminatory, so controversial and drawing so much opposition that the Commission cannot complete its full hearing and enter a final order within the seven months period. In fact, the more destructive, discriminatory and controversial the proposal—the more it violates the public policy declared by Congress—the better chance it has of becoming effective without administrative or judicial approval. The case at bar amply illustrates that fact.[2]

ARGUMENT

The Petition Should Be Granted Because the Court Below Erred in its Interpretation of Section 15(7) of the Interstate Commerce Act

The broad purposes of the Interstate Commerce Act are stated in the National Transportation Policy:

> ". . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (App. I).

The record establishes that if the proposed rates go into effect, Arrow Transportation Company, the largest common carrier barge line on the Tennessee River, will lose its grain traffic which accounts for 80% of its gross revenues. The rates will force its liquidation or insolvency and require it to surrender its certificate as a common carrier (R. 46). The Court of Appeals has interpreted Section 15(7) as depriving the equity court of jurisdiction to keep the rates from going into effect *pendente lite* after the seven months have elapsed. This interpretation enables the Southern to defeat the purposes of the Act by driving a competing water carrier out of business before the administrative processes can be completed. Such interpretation conflicts with the general rule of statutory construction that statutes are to be construed, if possible, to promote rather than to defeat their purposes. *Texas & P. R. Co.* v. *I.C.C.*, 162 U.S. 197, 218, 219 (1896).

---

[2] Experience has proved that once a new schedule of rates goes into effect, months and often years elapse before the processes of adjudication and review are completed and an effective order of cancellation entered.

The Court below imputed to Congress an intent to limit the inherent power of the equity court to prevent irreparable injury by maintaining the *status quo pendente lite.*[3] This interpretation conflicts with the general rule that before such intent will be imputed to Congress, that intent must clearly and unmistakably appear.

> "Nowhere does there appear [in the Act] any manifestation of Congressional intent to deprive the district courts of their inherent equity juris-

---

[3] The Court below stated that unreasonably low, monopolistic rates, if non-discriminatory, were lawful at common law (Supp. R. 8, 9, Supp. App. B). If true, which we doubt, the Court nevertheless ignores the grossly discriminatory feature of the proposed low rates. They will apply from Ohio and Mississippi River ports but not from Tennessee River ports. The enormity of the proposed discrimination against shippers at Guntersville is illustrated by the tables in King's affidavit (R. 50, 51).

> diction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action . . ." *Cantlay & Tanzola, Inc., supra*, p. 83. Accord: *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 15 (1941).

We find nothing in the Act or in its legislative history which evidences Congressional intent that, if the Commission fails to act within seven months, carriers should be free to pursue their destructive and monopolistic activities without restraint.

The Court below stated that if the court issues a *status quo* injunction, it thereby extends the suspension period and in effect amends Section 15(7). This is hardly accurate. If equity maintains the *status quo* in the narrow situation presented here, the court will simply be filling a void in the statute, i.e., providing essential protection which the Commission is powerless to provide for persons about to be irreparably damaged by unlawful decreases in rates.[4]

The Court below stated that petitioners would have a legal remedy under Section 8 of the Act (49 U.S.C., Section 8), but did not state that this remedy would be *adequate*. The District Court found that petitioners would be without *adequate* legal remedy (R. 81, App. B), and Southern has not sought review of that finding. Suffice to say that an action at law for damages under Section 8 can hardly be regarded as *adequate* to a competing carrier in bankruptcy or insolvency with its certificate surrendered, or to an elevator operator whose customers are gone and whose doors have long since closed, or to a municipality which has lost its major industries because of shocking rate discriminations.

---

[4] The Commission had no minimum rate power in 1910 when the statutory power to suspend rates was originally conferred. The minimum rate power came 10 years later (Feb. 28, 1920, c. 91, 41 Stat. 484). Broad jurisdiction over competing motor carriers came in 1935 (Aug. 9, 1935, c. [illegible]98, 49 Stat. 543), and over competing water carriers in 1940 (Sept. 18, 1940, c. 722, 54 Stat. 929), at which time the National Transportation Policy was adopted.

CONCLUSION

For the foregoing reasons, and those stated in the original Petition filed herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Donald Macleay
Macleay, Lynch, Channing &
Bernhard
1625 K Street, N. W.
Washington 6, D. C.

John C. Lovett
Lovett and Lovett
Benton, Kentucky

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend
and Friedman
First Federal Building
Birmingham, Alabama

Joe Starnes, Jr.
City Attorney
Guntersville, Alabama

SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,928

Arrow Transportation Company, et al., *Appellants,*

versus

Southern Railway Company, et al., *Appellees.*

Appeal from the United States District Court for the Northern District of Alabama.

Before Rives, Jones and Gewin, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause denying the motion for a preliminary injunction be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellants, Arrow Transportation Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued: September 7, 1962

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,928

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

versus

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Alabama.

(September 7, 1962)

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The question for decision is whether a federal district court has jurisdiction to extend by injunction the statutory seven-month period of rate suspension in a proceeding still pending before the Interstate Commerce Commission.

The plaintiffs, appellants, Arrow Transportation Company, et al., seek to enjoin the four defendants, appellee Railroad Companies, from applying to the rail transportation of grain certain railroad tariff schedules published by them and which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656, Grain in Multiple Car Shipments—River Crossings to the South. This appeal is from an order of the district court denying the plaintiffs' motion for a preliminary injunction solely on the ground that it had no jurisdiction of the subject matter.

The complaint based federal jurisdiction on diversity of citizenship, 28 U.S.C.A. § 1332; on the existence of a federal question, 28 U.S.C.A. § 1331; and on the Clayton Antitrust Act, 15 U.S.C.A. § 12, et seq., and 28 U.S.C.A. § 1337. The district court found the general jurisdictional averments as to diversity of citizenship and amount in controversy to be true. It further found that during 1961 the defendants published tariff schedules proposing to reduce substantially their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the Southeast. Its further findings of fact, conclusions of law and order are expressed so clearly and succinctly that they had best be quoted:

> "6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy—," and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.
>
> "7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to extend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.
>
> "8. The tariff schedules published by the defendants which are currently under investigation by the Com-

mission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a court of competent jurisdiction.

"9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

"10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

"11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

"12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

"CONCLUSIONS OF LAW

"1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

"2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate

Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necesary defendant, to review the order of the Commission.

"WHEREFORE, it is hereby ORDERED:

"1. That the motion for a preliminary injunction and a temporary restraining order be and the same is hereby denied.

"2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied."

Section 6 of the Interstate Commerce Act (49 U.S.C.A. § 6) provides that rates and charges for transportation shall be initiated and published by the carrier and shall not be changed except after thirty days notice to the Commission unless the Commission, in its discretion and for good cause shown, allows changes upon less notice. The section most pertinent to the present appeal is Section 15, paragraph (7):

> "*Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." 49 U.S.C.A. § 15, par. (7).

The Act seems to us to be a model of clarity. It is of course elementary that the power to prescribe rates to be charged in the future is a legislative function. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 1922, 259 U.S. 285, 291; *Terminal R. Asso.* v. *United States*, 1924, 266 U.S. 17, 30; *Interstate Commerce Commission* v. *Railway Co.*, 1897, 167 U.S. 479, 499; 13 C.J.S. Carriers, § 275(b), pp. 623, 624. Though not so frequently declared in the decisions, it would seem equally clear that the power to suspend or not to suspend rates involves a determination of what the rates shall be during the suspension period, which frequently extends over months and years, and is itself a legislative function. See *Board* v *Great Northern Ry.*, 1930, 281 U.S. 412, 429, 430; 1 Davis, Administrative Law Treatise, § 7.08, p. 442; 9 Am. Jur. Carriers, § 65, p. 472.

The Congress, in its wisdom, has permitted carriers to initiate their own schedule of rates subject to the authority of the Interstate Commerce Commission to determine the lawfulness of such rates. Pending the Commission's hearing for such purpose, it may suspend the operation of the rate schedule "but not for a longer period than seven months beyond the time when it would otherwise go into effect." 49 U.S.C.A. § 15(7). Some irreparable injury appears unavoidable in the process of establishing new rates. If the new rates are ultimately determined to be just, reasonable, and lawful, the carriers and that portion of the public which would benefit from the change in rates have nonetheless suffered irreparable injury during the period of suspension. If the period of suspension has expired and the new rate schedule goes into effect, but is subsequently determined to be unlawful, then competing carriers and that portion of the public which would suffer because of the change in rates has been injured during the period when the rates were not suspended, and in many cases that injury is irreparable.

In case of increased rates, the Commission may require refunds. Experience has proved that such power to require refunds is itself an inadequate and unsatisfactory remedy, but even that remedy is unavailable in the case of reduced rates.

Prior to the Act carriers were at liberty to establish and maintain even unreasonably low rates provided they were not discriminatory. *Keogh* v. *C. & N.W. Ry. Co.,* 1922, 260 U.S. 156, 161. If cheap rates are monopolistic or in restraint of trade, and are the result of a combination or conspiracy among carriers,[1] the Government has adequate civil and criminal remedies under the Antitrust Act. *Keogh* v. *C. & N.W. Ry. Co., supra.* Section 16 of the Clayton Act, however, clearly stands in the way of private injunctive relief.

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injuction may issue: *Provided,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitled any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any

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[1] Southern Railway Company has filed an affidavit to the effect that, "There was absolutely no concert of action between Southern and any other railroad in connection with the determination and publication of these rates which subsequently were suspended by the Interstate Commerce Commission and are now being investigated in ICC Docket I. & S. 7656."

> common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Title 15, U.S.C.A. § 26.

The Supreme Court has declared:

> "Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290; *United States* v. *Joint Traffic Ass'n,* 171 U.S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Co.* v. *New York Central R. Co.,* 271 U.S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. . . ."

Central Transfer Co. v. *Terminal R.R. Ass'n,* 1933, 288 U.S. 469, 474, 475.

Section 8 of the Interstate Commerce Act appears to provide that the carriers would be liable in damages to the persons injured if the cheaper rates are ultimately declared unlawful:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Title 49, U.S.C.A. § 8.

All of the provisions of the Interstate Commerce Act are required to be administered and enforced with a view to carrying out the National Transportation Policy declared in the Act of September 18, 1940, c. 722, Title I, § 1, 54 Stat. 499:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

An unreasonably low rate found to be in violation of the National Transportation Policy would give rise to an action for damages under 49 U.S.C.A. § 8. That such a finding may ultimately be reached after full hearing furnishes no authority to the Courts to extend the statutory seven-month period of rate suspension in the face of the clear mandate of the statute that, "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period . . ." [49 U.S.C.A. § 15(7).]

Essentially the Court is asked to declare as to the present case that the seven-month period of suspension provided in the statute is inadequate. If that can be done in this case, there is practically no end to the number of instances in which the courts will be called on to set aside the mandate of the statute. Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power.

We have given careful consideration to the excellent briefs of counsel on both sides and to those filed by amici curiae. A further discussion of many pertinent authorities would be in order if time were not of the essence. Since, however, this is a case where justice delayed would be justice denied, and we have no doubt of the soundness of our decision, we shall forego any further discussion. Since Southern Railway Company has not appealed, we do not pass on that part of the judgment denying its motion to dismiss. See 7 Moore's Federal Practice, 2nd ed., Sec. 72.05.

To afford the appellants a reasonable time to seek a writ of certiorari from the Supreme Court, it is directed that the mandate of affirmance issue twenty-one days from the date of this decision. See Fifth Circuit Rule 32. If during that period a petition for certiorari has been filed, prompt consideration will be given to any request for a further stay of the mandate. See 28 U.S.C.A. § 2101(f); Supreme Court Rule 18.

The judgment of the district court denying the motion for a preliminary injunction is affirmed.

AFFIRMED.

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No. 430

IN THE

Supreme Court of the United States

October Term, 1962

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company,
John D. Bagwell Farms and Hatchery, Inc.,
a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company,
a corporation,
St. Louis-San Francisco Railway Company,
a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION AND SUPPLEMENTAL PETITION

Dean Acheson
701 Union Trust Bldg.
Washington 5, D. C.

Francis M. Shea
734 15th Street, N. W.
Washington 5, D. C.

Attorneys for Respondent
Southern Railway Company

September 26, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION AND SUPPLEMENTAL PETITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (unreported) is printed as Appendix B to Petitioners' Supplemental Petition. All other relevant opinions are printed as Appendices to the original Petition.

QUESTION PRESENTED

Whether the Interstate Commerce Act means what it says in providing that a rate filed by a carrier and thereafter suspended by the Commission "shall go into effect" at the end of the statutory suspension period, even if the Commission has not concluded its hearings; or whether, on the other hand, a United States district judge has jurisdiction and authority to do what the Commission is not permitted to do, namely, restrain the carrier from putting the rate into effect after the end of the statutory suspension even though, if the rate goes into effect and is subsequently held illegal, persons injured thereby have a statutory remedy for damages, whereas if the rate is not permitted to go into effect and is subsequently found legal, shippers and consumers as well as the carrier, who would have benefited from the rate, have no remedy whatsoever for injuries suffered by reason of the suspension.

STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such

hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges, as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 8 of the same Act, 49 U.S.C. § 8, reads:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount *of damages sustained* in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

STATEMENT

Proceedings Below

The petition seeks review of a judgment of the Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Northern District of Alabama, which on August 2, 1962, denied petitioners' motion for a preliminary injunction. The injunction asked for was one forbidding respondent Southern Railway Company (hereafter Southern) to put into effect certain reduced grain rates which it had filed with the Interstate Commerce Commission. The rates were then and are now under investigation by the Interstate Commerce Commission, which had in accordance with Section 15(7) of the Interstate Commerce Act suspended their effectiveness until August 7, 1962, at which time the statutory suspension period expired by law. (Pet. App. B).

On August 3, 1962, the day after the District Court's decision, Judge Gewin of the Court of Appeals for the Fifth Circuit granted a temporary restraining order of one day's duration (from August 7 to August 8) to give a full panel of that Court an opportunity to hear petitioners' application for a restraining order pending appeal to it of the District Court's decision. That application was duly heard on August 8, and on the same day the Court of Appeals, finding that "there is no reasonable prospect that the appellants will ultimately be successful upon this appeal," denied it. (*Pet. App. D*). *Thereafter Mr. Justice* Black extended the restraint theretofore placed on Southern pending filing by petitioners of a petition for certiorari and its disposition by this Court.

In consequence of the events described, by the earliest date that this Court can pass upon the petition Southern will have been already continuously restrained from putting its rates into effect for more than eight weeks beyond the time at which both courts below have declared that by law such restraint must end.

The rates here involved, more specifically described below, were filed by Southern with the Commission in July 1961. Protests were filed by barge lines currently moving grain to the Tennessee River ports; large grain receivers by water located at the Tennessee River, such as Cargill, Incorporated, Central Soya Company and Dixie-Portland Flour Mills; Tennessee Valley Authority; flour milling interests outside the Southeast; certain boards of trade such as those of Chicago, Kansas City and Toledo; and others who expected to feel the competitive impact of these reduced rates.[1] Southern's rates were supported by numerous receivers of grain in the Southeast, by the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utility Commissioners, state regulatory commissions throughout the South and in many of the Western grain-growing states, several organizations representing poultry and livestock producers in the Southeastern states, etc.

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[1] It may be noted that only a very few of these protestants are petitioners here.

The Commission suspended the rates for the statutory period of seven months and instituted an investigation proceeding as required by the statute. Southern agreed to extensions of the suspension period for four additional months to compensate for delays in the hearing. With such extensions the statutory period ended on August 7, 1962. Southern made it clear from the beginning that it was not prepared to agree to additional voluntary suspension, since it had made a very heavy capital investment to make possible the new rate structure and since shippers and consumers throughout the Southeast, as well as the Governments of the Southeastern states, were counting heavily on the benefits that the new rates will occasion.

The evidentiary hearing before an examiner began on January 8, 1962. Southern's case-in-chief was completed February 8, 1962; that of protestants on June 11, 1962; Southern's rebuttal case, largely prepared in writing and submitted to protestants in advance, on August 29, 1962, on which date the hearing closed. A large proportion of the time devoted to Southern's case-in-chief and rebuttal was taken up with cross-examination by the protestants of witnesses for Southern and supporting intervenors.

Petitioners on July 27, 1962, filed their complaint to enjoin the rates following the expiration of the statutory suspension period, and on August 1 moved for a preliminary injunction. Southern answered and moved to dismiss on the same day, and the proceedings have thereafter taken the course outlined at the beginning of this Statement.

The History of the Rates in Question

Petitioners have sought to cast about this case a sinister aura of predatory and monopolistic intent.[2] A *brief description* of the history of the rates involved, as disclosed by evidence adduced in the proceeding before the I.C.C. and affidavits filed in the District Court, will serve to put their contentions in proper perspective.

The management of Southern does not share the defeatest belief, often expressed, that railroads, once a vigorous if not revolutionary factor in national development, have, so to speak, passed from middle age into decline and have no further imaginative contribution to make to the future development of the communities they serve. Southern's management has been at work for some years upon a far-reaching transportation innovation, which, through making possible a great reduction in rates applicable to a commodity of vital and widespread importance to the whole Southeastern United States, would stimulate and multiply economic activity throughout that whole area. The enthusiastic support which the results of these efforts have inspired, not only among farmers, consumers and business enterprises, but throughout the State Governments in the Southeast and elsewhere and in the

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[2] On the other hand, petitioners did not seriously press in the courts below, and before this Court have not even adverted to, the allegations of conspiracy that appear in their complaint.

United States Department of Agriculture, attests to their success.

At the present time the large amount of grain which moves into the Southeast, a deficit area in this commodity, is carried roughly 60% by back-haul "gypsy" truckers and merchant truckers whose rates are exempt from regulation by the Interstate Commerce Commission, 20% by barges also free for the most part from rate regulation by virtue of the bulk commodity exemption and 20% by railroads whose rates are entirely regulated. The higher transportation cost of the 20% of the grain moved by railroads, with resulting higher rates, has in the past provided an umbrella over charges laid upon the other 80% of the movement.

The endeavor of Southern to produce more realistic rail rates brought together experts and ideas from many sources to contribute a series of radical innovations—a technological innovation in construction of cars to move grain in bulk so that much more cargo might be moved per ton of car weight; an innovation in railway management to encourage multiple car movements and thus decrease the cost of paper work, switching, etc.; an innovation in rate structure which cut out "frills" included in rates (e.g., in-transit privileges), thus producing what might be called a tourist rate for bulk movements of grain. The rate innovation made possible by these steps is one of application to grain movements from the river crossings on Southern's system at Cincinnati, Louisville, Evansville, St. Louis, and Memphis to points on its system in the Southeast. Southern has offered on the record before the Commission to extend these rates to any point on its system where they are desired, whether such point is on a river or inland.

The rates apply only to movements of grain in so-called "Big John" freight cars with aluminum bodies, especially designed and built for this use. To secure application of the most advanced light metals construction techniques Southern had to go outside the railroad equipment industry to Lockheed Aircraft Corporation, with whose co-operation the Big John was ultimately successfully developed. In order to secure the development and manufacture of the cars on an economically feasible basis, it was necessary to acquire them in substantial numbers. Accordingly, Southern purchased a total of 575 of which more than 500 have already been delivered and the balance will be delivered by October 1. Each car has a cargo capacity approximately twice that of a conventional freight car but has an empty weight only slightly greater.

The rates apply only to movement in five, ten and twenty car lots, which permits substantial savings in switching service at plants and in classification and transfer, where the cost of work on multiple car lots is little greater than on a single car. They apply only on bare transportation with no in-transit privileges and with strict demurrage rules designed to keep to an absolute minimum the time that cars are out of transportation service, a service comparble to that furnished by barge and truck and which meets the same demand.

The dramatic operating and other economies resulting from the combination of factors listed makes possible the rates now under consideration by the Commission. The Southeastern portion of the United States is a rapidly developing area with increasing diversity of economic activity. There grain consumption is already large, requiring large imports from other areas.

With more economic transportation costs, and consequently lower prices, new and expanded demands for grain can be created, for processing directly for human consumption and as animal and poultry feeds.

REASONS FOR DENYING THE WRIT

The decision below presents no important question of federal law appropriate for review by this Court, results in no conflict of decision warranting such review, and is plainly correct. Moreover, in the circumstances of this case the very granting of the writ would, in practical effect, be virtually tantamount to a determination on the merits in favor of petitioners and would result in irreparable injury not merely to Southern, but likewise to a large number of shippers and consumers in the Southeastern United States.

The suspension provisions of Part I of the Interstate Commerce Act, embodied in Section 15(7) (49 U.S.C. § 15(7)), have with minor changes been continuously in effect since 1910, except for a brief period during and immediately after World War I. Similar provisions, giving the I.C.C. or another regulatory agency the authority to suspend for a limited period rates filed by those subject to the agency's jurisdiction, and providing that at the end of the suspension period the rates are to go into effect, have been contained for many years in the Motor Carrier Act (49 U.S.C. §§ 316(g), 318(c) (since 1935)), the Water Carrier Act (49 U.S.C. § 907(g), (i) (since 1941)), the Freight Forwarders Act (49 U.S.C. § 1006(e) (since 1942)), the Federal Communications Act (47 U.S.C. § 204 (since 1934)), the Federal Power Act (16 U.S.C. § 824d(e) (since 1935)), the Natural Gas Act (15 U.S.C. § 717c (e) (since 1938)), and the Federal Aviation Act (49 U.S.C. § 1482(g) (since 1938)).

During all these periods of years, and under all these statutes, there has prior to this case not once arisen the question which petitioners would have this Court believe is of pressing and general importance. Not once has a competitor, or a user of the regulated service or commodity, urged any court that rates or charges which have been suspended by the agency, but as to which the suspension period has expired prior to completion of the agency investigatory proceeding, should be set aside pending the completion of that proceeding.

This fact necessarily leads to one or both of two conclusions: (1) that no one has ever heretofore felt the need for a remedy of the kind here sought, or (2) that it has always been regarded as too plain for argument that this particular form of relief is not available. Whether taken separately or together, these are compelling grounds for a determination that no grant of the writ is here warranted.

If the first conclusion is correct, it is apparent that except in factual circumstances so unusual that there is no reason to anticipate their recurrence, the availability of relief of the kind here sought is of only academic significance—that this case presents no question of genuine importance but rather one whose resolution would have a practical impact only on the interests of the immediate parties. And if the true explanation is simply that the answer to the question here presented has always been regarded as clear, that is itself the strongest possible demonstration of the fact that this case raises no novel issue, but rather one settled long ago by a statutory provision that is, as the Court of Appeals noted in its decision on the merits, "a model of clarity."

To demonstrate that the decision below correctly applies settled principles, it seems hardly necessary to go beyond the words of the statute itself. Unless Congress meant something very different indeed from what it said, its plainly expressed intent was, in the words of the statute, that after a rate is suspended and a proceeding instituted:

> "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice *shall go into effect at the end of such period* * * *." [Emphasis added.]

That Congress in fact meant precisely what it said, and that under the scheme of the statute it is only the Commission which has the authority to suspend rates, and that only for the period specified in the statute, was unequivocally confirmed by Chief Justice Hughes, speaking for a unanimous Court, in *Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co.,* 281 U.S. 412, 429:

> "When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra.* Congress, in 1910, authorized the Interstate Commerce

> Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. [citations omitted] *This power of suspension was entrusted to the Commission only.*" [Emphasis added.]

The scheme of the statute is clear. When Congress decreed that the Interstate Commerce Commission might suspend rates for a stated period while an investigation of their legality was commenced, it quite understandably gave the suspensory power to the Commission alone; for, as the Court of Appeals pointed out, the power to suspend rates is, in effect, one to determine them for the period of suspension and is a legislative function. Furthermore, Congress by this enactment "cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *." See *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 479. In providing that any suspension should be for a maximum fixed period—since 1927 seven months—and in rejecting the alternative of permitting the suspension period to run until the time of decision by the Commission, Congress made a balanced and deliberate compromise between conflicting interests.[3] It placed upon the carrier instituting the rate the burden of having the rate suspended by the Commission without any provision for compensation by a suit for damages should the rate subsequently be declared legal. But for this very reason, it limited the period over which the carrier might be required to bear this burden to a time certain—seven months. At the same time, it provided for persons, like petitioners, claiming injury from an allegedly unlawful rate not only the protection of the Commission's right to suspend that rate for a seven-month period (by the expiration of which an investigation of its legality would, if not completed, be well under way) but also a specific statutory remedy in damages. (49 U.S.C. § 8). This balancing of equities, so carefully made by the lawmaker, petitioners would now upset. They would bear none of the burdens inherent in determining a new rate, but would place them all upon Southern and upon the many shippers and consumers which Southern serves. And this though the burden which petitioners seek to shift would as to them be merely having to be content with their remedy at law if the rate proves to be illegal whereas to Southern, shippers and consumers that burden would be complete foreclosure from the benefit of the new rates for a substantial additional period even if those rates are lawful. The courts below were clearly correct in refusing to disregard the studied compromise that Congress has made in Section 15(7) by decreeing that the carrier must bear the whole of a burden that Congress has determined it should bear only in part.

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[3] The meticulous care with which Congress made this compromise is demonstrated by the fact that before it settled on the present seven-month suspension period, it experimented with both longer (see 36 Stat. 552) and shorter (see 41 Stat. 486) periods. It specifically rejected the suggestion that new rates should be suspended until the Commission had passed on their lawfulness, placing the rejection on the ground that such a provision would be unfair to carriers and that a compromise solution was more equitable. See 45 Cong. Rec. 4109-4110, 4711-4713, 5443, 5846-5849, 6509, 6782, 6787, 6915. See also H.R. Rep. No. 456, 66th Cong., 1st Sess.; 58 Cong. Rec. 8317.

Petitioners' extravagant assertions that the decision of the courts below leaves common carriers "free to engage at will in unlawful, monopolistic competitive practices, contrary to the public interest and to declared national policy" (*e.g.,* Pet. p. 9) is pure bombast. The Commission is authorized to declare an obviously predatory rate unlawful on its face, long before the suspension period could have elapsed, and Section 8 of the Act (49 U.S.C. § 8) which the Court of Appeals expressly noted gives a statutory right of action for damages to persons injured by an unlawful rate, stands squarely in the way of the drastic consequences that petitioners purport to envisage. Petitioners' plaintive assertions as to the "inadequacy" of the latter remedy must be evaluated in light of the fact that Southern, and the many shippers and consumers to whom the new rates will be a great boon, would have *no* remedy should an injunction issue and the rates subsequently be declared to be lawful.

Petitioners' argument that the decision below raises constitutional questions is frivolous. It is well settled that business enterprises have no constitutional right to be protected from competition, *Tennessee Power Co.* v. *T.V.A.,* 306 U.S. 118. Thus Congress, in giving persons like petitioners the right to challenge the rates of their competitors, was plainly free to place any limitations it saw fit on the manner in which that right might be exercised.

The suggestion that the decision below conflicts with *Pacific Inland Tariff Bureau* v. *United States,* 129 F. Supp. 472 (D. Ore. 1955), and *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Cal. 1953), will not survive analysis. As petitioners' papers themselves disclose, each of those proceedings involved review by a statutory three-judge court of an order of the Interstate Commerce Commission. Here, in contrast, petitioners sought an injunction from a single judge, and are not asking for review of any order of the Commission since no such order as yet exists.[4]

It should be emphasized that although judgment has gone against petitioners in both courts below, with the Court of Appeals in effect ruling that petitioners' position was frivolous by denying them interlocutory relief pending its decision, petitioners have nevertheless already won a large measure of the relief that they sought in this case. By the time this Court can pass on their petition for certiorari, the rates in question will already have been suspended for more than two months beyond the expiration of the statutory suspension period, to the great detriment of shippers and consumers in the Southeastern United States, as well as to Southern. Were this Court to grant certiorari and continue, pending oral argument and decision, the injunction forbidding Southern to give shippers and consumers the benefit of the reduced rates, the consequences to Southern, to shippers and consumers, and to the economies of the states which Southern serves, would be even more severe. For were this to happen, petitioners would have achieved substantially the *entire* measure of relief sought by their complaint, and this irrespective of whether this Court ultimately were to rule for or against petitioners or indeed whether, as would be not at all unlikely, the case were to become moot pending decision on the merits.[5]

---

[4] The court in Cantlay & Tanzola expressly noted that:

> "The Congressional intent plainly is that the courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission.' Board of Railroad Com'rs. v. Great Northern Ry. * * *." 115 F. Supp. at 83.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Dean Acheson
701 Union Trust Bldg.
Washington 5, D. C.

Francis M. Shea
734 15th Street, N. W.
Washington 5, D. C.

Attorneys for Respondent,
Southern Railway Company

September 26, 1962

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[5] As to cases involving a different but comparable issue which have become moot pending decision by this Court, see Luckenbach Steamship Co. v. United States, 179 F. Supp. 605 (D. Del. 1959), in part vacated and ordered dismissed as moot, 364 U.S. 280; Dixie Carriers v. United States, 143 F. Supp. 844 (S.D. Tex. 1956), vacated and ordered dismissed as moot, 355 U.S. 179; Amarillo-Borger Express v. United States, 138 F. Supp. 411 (N.D. Tex. 1956), vacated and ordered dismissed as moot, 352 U.S. 1028.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINES RAILROAD COMPANY, a corporation,
Respondents

PETITIONERS' BRIEF IN REPLY TO BRIEF OF SOUTHERN RAILWAY COMPANY OPPOSING CERTIORARI

DONALD MACLEAY
Macleay, Lynch, Channing & Bernhard
1625 K Street, N. W.
Washington 6, D. C.

JOHN C. LOVETT
Lovett and Lovett
Benton, Kentucky
Attorneys for Petitioners

Of Counsel:
Sirote, Permutt, Friend and Friedman
First Federal Building
Birmingham, Alabama

JOE STARNES, JR.
City Attorney
Guntersville, Alabama

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1962

No. 430

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company,
John D. Bagwell Farms and Hatchery, Inc.,
a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company,
a corporation,
St. Louis-San Francisco Railway Company,
a corporation,
Seaboard Air Lines Railroad Company, a corporation,
Respondents

PETITIONERS' BRIEF IN REPLY TO BRIEF OF SOUTHERN RAILWAY COMPANY OPPOSING CERTIORARI

STATEMENT

Southern's brief contains numerous statements of fact which are so foreign to the record and so grossly inaccurate as to suggest that the new counsel may be relying more upon Southern's widely advertised propaganda than upon the evidence adduced in the Court below and before the I.C.C. Southern's effort to minimize the importance and novelty of the legal issue presented evidences a decided reluctance to face up to one of the most important, and as yet unanswered, legal questions which have grown out of the regulation of rail rates since enactment of the National Transportation Policy. This importance is underscored by the Commission's declaration on January 5, 1962, that issues involved in the suspended rates are of "general transportation importance".[1]

THE RATES INVOLVED

The rates under suspension are not the product of laudatory benevolence as Southern contends. Rather they represent a cold blooded effort to destroy competition and monopolize the grain traffic into the Southeast. Southern is not merely passing on to the public legitimate savings which accrue from genuine technological developments and a "far reaching transportation innovation". Technological progress and transportation innovations have not yet wrought changes in railroading which make it cheaper to haul grain by rail than by barge. And it is not a fact that the destruction of barge transportation, the elimination of waterways as arteries of commerce, and the abandonment of communities, facilities, and industries geared to barge transportation are simply the inevitable results of progress in transportation.

On the contrary, the proposed rates, which are 65% below the level of existing rail rates on which millions of bushels of grain move, are a classic example of that type of selective rate cutting which the National Transportation Policy has outlawed. The proposed rates apply *only* from specified origins on the Ohio and Mississippi Rivers to specified destinations in the Southeastern states and intermediate points; *they do* not apply to rail shipments from the Tennessee River ports and thus discriminate against those ports. They apply *only* to shipments of 450 tons or more; thus, those small businessmen who are unable to receive, unload, store and pay for 450 tons (about 16,000 bushels) of rail grain at one time will be seriously prejudiced *vis a vis* their larger and wealthier competitors.[2] The tariffs provide a $2.40 per ton minimum rate which is absolute up to 346 miles; hence, the short haul shipper is victimized by discriminatory rates which require him to pay the same rate as the long haul shipper.[3] And, contrary to the statement on page 9 of Southern's brief, the rates are not limited to grain in the "Big John" cars. For every other railroad serving the South they would apply to ordinary hopper and standard box cars.

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[1] Evidently the other Respondents do not intend to oppose the issuance of the writ. This reply, therefore, is being filed prior to the expiration of the period allowed by Rule 24(1) for filing of Respondents' briefs in opposition to the petition.

An single example will demonstrate the destructive effect of these rates. In *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam*, 361 U.S. 353 (1960), the three judge court used Orangeburg, S.C. as a typical destination for illustrative purposes. Let us use the same city.

The present rail rate from the Mississippi River port of St. Louis to Orangeburg, a distance of 847 miles, is $12.50 per ton. Southern's proposed rate is $5.27. The rail rate from the Tennessee River port of Guntersville, Alabama, to Orangeburg, a distance on only 385 miles, is $6.00 per ton. It would not be changed by the suspended tariffs. Under the suspended rates, if Arrow made the 586 mile barge haul from St. Louis to Guntersville *without charge* and, in addition, transferred the grain from barge to rail car *without charge*, the barge-rail movement would still cost the shipper 63 cents per ton more than the all-rail haul (King Aff. R. 50).

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[2] 376 grain operators in 8 southern states formed an Association soley to protest the proposed rates. Most were concerned about the threat to the small businessman.

[3] See King Aff. P. 49.

The struggle between the barge lines and the railroads is not a struggle between equals. Arrow handles few commodities (of which grain is by far the most important) and these only between river ports. On the other hand, the traffic Southern handles in competition with Arrow is a very small proportion of its total traffic. It can carry this traffic at a loss for the short time necessary to destroy its competition. This is not a new tactic by any means. It has been used before with very great success.[4] If the equity court is impotent, the tactic can be used again and again, and the competition destroyed while the Commission investigates the lawfulness of the means used to accomplish the destruction. Southern knows this as well as petitioners.

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[4] In *Petroleum Products from New Orleans, La. Group to Memphis, Tenn. Group River Points* 194 I.C.C. 31 (1933) Commissioner Eastman described this success:

> "The railroads in their early years encountered stiff opposition from many steamboat lines plying upon these waters. They proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.
>
> "This was done by cutting rates where the competition existed, to whatever extent was necessary to paralze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have this reservoir of non-competitive traffic to help them out and hence perished in the unequal struggle (p. 44)."

These proposed rates are not, as Southern declares, truck competitive rates. While evidence before the Commission is in conflict, it is clear that Southern has vastly overstated the volume of truck movement The rates when first proposed were aimed at barge transportation.[5] The truckers became the quarry as an after thought.

REPLY TO SOUTHERN'S ARGUMENT

Southern (p. 11) takes solace from the fact that the narrow issue involved here has never arisen before. At the same time, it denies that the issue has novelty. The fact is that the essential issue (whether the court can restrain drastic rate reductions after the suspension period and prior to a final, reviewable Commission order) has arisen twice before and each time was decided adversely to the railroads without appeal to this Court.[6]

In *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281, U.S. 412 (Southern's brief p. 12), the Court, prior to the enactment of the National Transportation Policy, was confronted with a delicate federal/state relationship. The Court took pains to point out that the 10% reduction in intrastate rail rates ordered by the North

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[5] In its reply to the petition for suspension, filed August 3, 1961, Southern stated that "The bulk of the grain traffic to the involved area is presently moving by unregulated water transportation, public and private, and to a lesser degree by unregulated trucks."

[6] See page 8, original Petition.

Dakota Commission was not claimed by the railroad to be confiscatory or destructive. Therefore, it refused to interdict the state prescribed rate until the railroad pursued its remedy before the I.C.C.. In the case at bar, however, the rate reductions are both destructive and confiscatory.

Southern urges that in Section 15(7) Congress delicately balanced conflicting interests. This is true as far as it goes. Congress recognized that the railroads would be deprived of revenues from *increased* rates if the suspension period continued for more than 7 months. It intended that they go into effect, subject to refund if the increases were later declared unlawful. There is, however, no evidence of Congressional intent to balance the conflicting interests of competing carriers when the proposal is destructive of competition. Nor is there any sound public policy which dictates that competition be destroyed while the Commission deliberates.

Southern insists, and the Court of Appeals found, that to extend the suspension period is to determine rates in the interim, a legislative function. It should be noted that the Court will legislate by non-action as well as by action; in either event, the interim rates will have been fixed by the exercise or non-exercise of a judicial function. The question is whether Congress intended that the carrier's right to initiate rates be paramount to the Court's right to enjoin if the rates are outside what the Court in *T.I.M.E. Inc.* v. *United States*, 359 U. S. 464 (1959) called the "zone of reasonableness", i.e. will defeat the purpose of Congress, destroy competition, monopolize traffic, and inflict irreparable injury.

Southern's insistence that it will be irreparably injured if it is not permitted to effectuate these drastic rate reductions ignores the fact that maintenance of the *status quo* simply keeps Southern in the same rate position it created for itself years ago, while to permit the rates to go into effect prior to Commission action will utterly destroy petitioners. Southern seeks a new status; petitioners seek to preserve the existing status *pendente lite.*

Southern's lament for "the many shippers and consumers to whom the new rates will be a great boon" has a hollow sound, coming as it does from a railroad which has consistently refused to cooperate with the barge lines in reducing transportation costs on grain into the southeast. Significantly, Southern does not bleed for the other railroads who published the same rates but who obviously are not enthusiastic about the rates and do not anticipate any damages from their continued abeyance. They have not supported the rates before the Commission, and have not opposed granting of the writ. In any event, one fact is crystal clear; the District Court balanced the equities and found them to weigh heavily on the side of petitioners. That Court's memorandum (App. C, R. 73-77) makes it abundantly plain that but for its doubts as to its jurisdiction, it would have issued the *status quo* injunction so as to serve "the ends of justice".

Southern claims that the writ should be denied because the issue may become moot before this Court can decide it. Of course, a degree of potential mootness is inherent in this and every other issue. If the Writ is denied on this ground, however, it is difficult to see how this issue, which is crucial to the preservation and implementation of the National Transportation Policy, can ever reach this Court for decision.

None of the petitioners seeks freedom from competition. None has or desires a monopoly; hence *Tennessee Power Co.* v. *T.V.A.*, cited on page 15 of Southern's brief, is inapplicable. Petitioners seek protection against unfair, destructive competition—from below-cost rates proposed by its competitor. Southern has never claimed, either before the Commission or before the Courts, that the proposed rates will pay the full cost.

CONCLUSION

For the reasons heretofore stated, the Petition should be granted.

Respectfully submitted,

Donald Macleay
Macleay, Lynch, Channing &
Bernhard
1625 K Street, N. W.
Washington 6, D. C.

John C. Lovett
Lovett and Lovett
Benton, Kentucky

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend
and Friedman
First Federal Building
Birmingham, Alabama

Joe Starnes, Jr.
City Attorney
Guntersville, Alabama

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SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF FOR THE PETITIONERS

Of Counsel:

SIROTE, PERMUTT, FRIEND
AND FRIEDMAN
First Federal Building
Birmingham, Alabama

JOE STARNES, JR.
City Attorney
Guntersville, Alabama

JOHN C. LOVETT
Lovett and Lovett
Benton, Kentucky

DONALD MACLEAY
Macleay, Lynch, Channing &
Bernhard
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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44 Stat. 1447-8, 49 U.S.C. § 15(7).........2, 6, 8, 9, 16, 17, 23, 25, 29, 30, App. A.
62 Stat. 928, 28 U.S.C. § 1254(1) 2
62 Stat. 970, 28 U.S.C. § 2324....................... 28
62 Stat. 970, 28 U.S.C. § 2325 28

MISCELLANEOUS:

28 Am. Jur., *Injunctions*, § 16 (1959) 11
43 C.J.S., *Injunctions*, § 13 (1945) 11
Hart & Wechsler, *Federal Courts and the Federal System*, (1953) 30
Annot., 38 L.R.A. (N.S.) 228 (1912) 11
49 Col. L. Rev. 1124 (1949) 16
45 Cong. Rec. ....18, 19, App. C (1), (2), (3)
59 Cong. Rec. ....22, App. C (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners
v.
SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

None of the opinions below has been officially reported. The Memorandum opinion of the District Court, dated August 2, 1962, appears at R. 52-55. The District Court's Findings of Fact, Conclusions of Law and Order denying petitioner's motion for preliminary injunction, dated August 3, 1962, appear at R. 55-58. The Court of Appeals' opinion and its judgment of affirmance here under review were entered on September 7, 1962, and appear, respectively, at R. 116-125 and R. 126.

JURISDICTION

This case is before this Court for review pursuant to a Writ of Certiorari granted on October 15, 1962 (R. 143). Mr. Justice Black ordered petitioners to file their Petition for Writ of Certiorari within thirty days after August 17, 1962 (R. 104). It was filed on September 14 and was supplemented on September 18, 1962. The judgment here under review is dated September 7, 1962 (R. 126). The jurisdiction of this Court rests on 62 Stat. 928, 28 U.S.C., Section 1254 (1).

STATUTES INVOLVED

The statutes involved are Section 15(7) of the Interstate Commerce Act (44 Stat. 1447-1448, as amended; 49 U.S.C. § 15(7)), the second restriction of Section 22(1) of the Interstate Commerce Act (24 Stat. 387, as amended; 49 U.S.C. § 22(1)), and the National Transportation Policy (54 Stat. 899; Note preceding 49 U.S.C. § 1). The texts of these statutes are set forth in Appendix A.

QUESTION PRESENTED

Whether a District Court is powerless to prevent irreparable injury to shippers, port cities, and competing barge lines by temporarily enjoining a railroad from putting rates into effect until the Interstate Commerce Commission can complete an investigation and render a final decision as to their lawfulness in a situation in which the Commission has suspended the proposed rates on the ground that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .", but has been unable to complete its investigation within the suspension period and is without further power to suspend the rates.

STATEMENT

The Tennessee River in its natural state was a series of rapids and shoals unsuited for modern navigation. The Construction of a series of dams by the Tennessee Valley Authority has provided a modern waterway well suited for the movement of grain from the surplus-producing areas of the Midwest to the deficit areas of the Southeast. This is illustrated by the chart attached as Appendix B. With the coming of barge transportation, a large poultry industry developed in Georgia and Alabama and a milling industry grew up rapidly at points on the Tennessee River, particularly Chattanooga, Tennessee, and Guntersville, Alabama. Grain is shipped to these two river ports by barge and is subsequently reshipped to its ultimate destination, either as grain or grain products.[1]

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[1] See *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam*, 361 U.S. 353 (1960); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan. 1961); *American Barge Line Co.* v. *Alabama G. S. R. Co.*, 306 I.C.C. 167, 174 (1959).

The movement of grain has become a major part of the total barging service on the Tennessee River; in the case of petitioner Arrow Transportation Company, a certificated common carrier, the movement of grain accounted in 1960 for 68 percent of its total tonnage and more than 80 percent of its total revenues (R. 33). The railroads sought for many years to impede the barge movement of grain by charging higher rates on grain outbound from the Tennessee River ports when the grain had arrived at those ports by barge than when it had arrived by rail. After lengthy litigation, this practice was declared unlawful (see cases cited in footnote 1).

The Southern Railway then resorted to a new tactic. In July, 1961, it published reduced rail rates on grain from St. Louis, Cairo, Memphis, Evansville, Louisville, and Cincinnati to selected destinations in the Southeast. The proposed rates are on three different levels applicable to minimum shipments of 450, 900, and 1800 tons, respectively (R. 35). They average less than 40 percent of the presently existing rates (R. 36). The costs which the railroads would incur in handling this traffic are, of course, disputed, but the District Court had before it the affidavit of a nationally recognized cost expert that the revenues which the railroads would receive under the proposed new rates would average, for all of the routes involved, only 84 percent of their out-of-pocket costs (R. 42-43).

The effect of the proposed rail rates on the barge movement can be illustrated by a single example.

The rail distance from St. Louis to Birmingham is 472 miles and the present all-rail rate is $8.70. The proposed rate is $3.12, a 64 percent reduction. The barge-rail charges via Guntersville amount to $5.48, consisting of $2.39 for the 586-mile barge haul from St. Louis to Guntersville, $2.20 for the 71-mile rail haul from Guntersville to Birmingham (which would not be reduced), and an 89¢ charge for the transfer from barge to rail car. Hence, the all-rail rate would be $2.36 per ton cheaper than the barge-rail charges, and, in order for Arrow to compete, it would have to reduce its rate on the barge leg of the movement from $2.39 to 3 cents per ton (R. 36). Arrow could not compete on movements from St. Louis or Evansville to most destinations in the Southeast if it furnished the barge transportation without charge (R. 36). The destructive effective of such rates on barge lines, and on mills at the Tennessee River ports whose operations are geared to barge service, is obvious (R. 33-34, 43-46).

The injury to small shippers at interior points who can use only a single carload of grain at a time is equally obvious. Because of their size they would not be able to use the new rail rates; using the old single-car all-rail rates (averaging two and one-half times the multi-car rates) they could not possibly compete with the larger shippers who could take advantage of the new rates (R. 38-39).

The effects on a port city like Guntersville, where a milling industry based on the barge movement is of prime economic importance, would also be very serious (R. 39-41).

Protests against the proposed new rates were filed with the Interstate Commerce Commission by various water carriers, shippers, and others. The Commission found "reason to believe that [the proposed rates] would, if permitted to become effective, result in rates and charges, rules, regulations, or practices which would be unjust and unreasonable in violation of the

Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy.'" The Commission ordered them suspended, pending investigation, for 7 months R. 56-57), the maximum period for which it could order suspension under Section 15 (7) of the Interstate Commerce Act. The investigation hearings were to begin in October, 1961 (R. 57), but were postponed to January 6, 1962, at Southern's request because of a change of counsel; and after the hearings began, illness of Southern's counsel interrupted their progress for 30 days. Compensation for these delays necessitated a voluntary extension of the suspension period to August 7, 1962 (R. 16, 57).

When it became apparent that the Commission could not reach a final decision by August 7, 1962, the protestants asked Southern further to postpone the effective date of the proposed rates until the Commission could act (R. 57). Southern refused (R. 8, 57).

On July 27, 1962, petitioners filed their verified complaint in the District Court, requesting a status quo injunction restraining the railroads from placing the proposed rates into effect until the Commission could pass on their lawfulness (R. 4-15). Supporting affidavits were filed dealing with the destructive and discriminatory nature of the proposed rates, the extent of the injuries they would inflict upon petitioners, and the relationship of the rates to the railroads' costs (R. 32-46). Southern filed an answer (R. 48-52), a motion to dismiss (R. 47), and counter affidavits (R. 15-32).[2] The other respondents entered appearances but filed no responsive pleadings (R. 55).

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[2] The order of the supporting affidavits and counter affidavits has been transposed in the record.

A hearing was held by the District Court on August 1, 1962, with all parties relying upon the affidavits and verified pleadings and introducing no additional evidence (R. 56). On August 2, 1962, the Court filed a Memorandum opinion (R. 52-55), in which it stated:

> "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case" (R. 54-55).

On August 3, 1962, the Court entered Findings of Fact, Conclusions of Law and Order (R. 55). It specifically found (a) requisite diversity of citizenship and amount in controversy; (b) jurisdiction of the parties; (c) grave danger of irreparable injury, loss, or damage; and (d) absence of an adequate remedy at law (R. 55-58), but denied a preliminary injunction on the ground indicated in its Memorandum opinion.

Petitioners filed a notice of appeal (R. 61) and obtained a temporary restraining order pending a hearing before the Court of Appeals for the Fifth Circuit (R. 67); on August 8, 1962, a two-judge panel of the Court of Appeals denied petitioners' motion for a status quo injunction pending decision on the appeal from the District Court, but continued the restraining order to give petitioners an opportunity to seek relief from this Court (R. 100); on August 17, 1962, Mr. Justice Black extended the temporary restraining order pending final decision in this Court on the question of the District Court's jurisdiction (R. 101-105); on September 7, 1962, the Court of Appeals entered its opinion (R. 116-125) and judgment (R. 126) affirming the District Court but staying issuance of the mandate of affirmance for 21 days; and on September 26, Mr. Justice Black ordered that the status quo be preserved "pending final disposition in this Court of all matters in all the proceedings in this case or cases . . ."

SUMMARY OF ARGUMENT

The proposed rates are presumptively unlawful. If they go into effect, petitioners will suffer irreparable injury (amounting, according to the affidavits, to a deprivation of property) for which they have no adequate remedy at law.

An equity court possesses inherent power to prevent irreparable injury by issuing a temporary injunction to preserve the status quo pending the outcome of a proceeding in another forum, where the other forum is powerless to grant such relief. The inherent power to grant ancillary relief exists equally whether the other forum is a court or an administrative agency. The granting of ancillary relief does not interfere with the primary jurisdiction of the forum in which the principal action is pending, but on the contrary protects the primary jurisdiction and insures that it will be effective.

Contrary to the holding below, Section 15 (7) of the Interstate Commerce Act has not ousted the courts of their inherent power to provide ancillary relief in a case like that at bar. This section deals only with the power of the Interstate Commerce Commission.

It imposes a time limit within which the Commission may order suspension of proposed rate reductions, but does not affect the power of an equity court to enjoin them for a further period. To construe Section 15 (7) otherwise, particularly when read in conjunction with the National Transportation Policy, would defeat the intent and purpose of Congress and would give rise to grave constitutional questions.

ARGUMENT

This case brings before the Court the latest episode in the war of extermination being waged by the Southern Railway against barge transportation on the Tennessee River. Other facets of this struggle have been before the courts in *Arrow Transportation Co.* v. *United States, supra; Atchison, T. & S. F. Ry. Co.* v. *United States, supra; and Tennessee Valley Authority* v. *United States,* 96 F. Supp. 409 (N.D. Ala. 1951).

The objective of the Southern is nothing less than the destruction of the Tennessee River as an artery of commerce, with the incidental destruction of industries that have settled on the Tennessee River in order to enjoy the advantages of barge transportation, and grave injury to the cities whose economic welfare depends upon barge transportation. It must be remembered that railroads always have it in their power to destroy a barge line with which they compete unless restrained by the Commission or the courts. The technique is illustrated by the present case. Grain carried to destinations which can also be reached by barge represents a minuscule percentage of the freight revenues of the Southern Railway. Grain carried to destinations which can also be reached by rail represents 80 percent of the freight revenue of the Arrow Transportation Company. This makes it possible for a railroad like the Southern to destroy its barge competition at any time by cutting rates on its barge-competitive traffic long enough to achieve its objective[3] unless restrained from so doing by the Commission or the courts. If the reductions in rates are such as to arouse widespread opposition and to require an extended hearing, a railroad has the power, unless restrained by the courts, to destroy the barge competition before the Commission can complete its investigation and rule on the lawfulness of the rates.

While this background is important to an understanding of the present case, the issue presented to the Court at this time is a narrow one. The Commission has found that there is reason to believe that the proposed rates are unlawful. The District Court has made all the findings necessary for the granting of a temporary injunction except the finding of jurisdiction to issue it.[4] For the purposes of the present case, therefore, it must be assumed that the rates proposed by the Southern will ultimately be found unlawful, that the petitioners will suffer irreparable injury if the rates go into effect, and that equitable considerations require that the rates be enjoined. This leaves a single issue—whether the District Court has power to grant the relief sought by petitioners.

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[3] This method of destroying barge competition is not new; railroads have employed it in the past with great success. Its use was described by Commissioner Eastman in *Petroleum Products from New Orleans, La., Group,* 194 I.C.C. 31 (1933):

"The railroads in their early years encountered stiff competition from many steamboat lines plying upon these waters, and they proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.

"This was done by cutting rates where the competition existed, to whatever extent was necessary to paralyze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have their reservoir of noncompetitive traffic to help them out, and hence perished in the unequal struggle" (p. 44).

One of the principal purposes of Congress in enacting the National Transportation Policy in 1940 was to prevent just this sort of destructive rate cutting. See *infra,* p. 23, et seq.

I.

An Equity Court Has Inherent Power to Prevent Irreparable Injury By Preserving the Status Quo Pending the Outcome of a Proceeding Before an Administrative Agency, Where the Agency Is Without Power or Has Exhausted Its Power to Do So

The power of equity to preserve the status quo, by means of a temporary injunction, pending the outcome of a proceeding in another forum has long been recognized. *Ehrardt* v. *Boaro*, 113 U.S. 537 (1885); *Buskirk* v. *King*, 72 Fed 22 (4th Cir. 1896); *Wood* v. *Braxton*, 54 Fed. 1005 (C.C.D. W. Va. 1892); Annot., 38 L.R.A. (N.S.) 228 (1912); 43 C.J.S., *Injunctions*, § 13 (1945); 28 Am. Jur., *Injunctions*, § 16 (1959).

There is no apparent reason why this inherent ancillary jurisdiction of equity courts should be affected by the fact that the other forum is a regulatory agency rather than another court, and the early cases assumed that ancillary injunctive relief was as appropriate in the one case as in the other. *Northern Pac. Ry. Co.* v. *Soderberg*, 86 Fed. 49 (C.C.D. Wash. 1898); *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568

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[4] The findings of the District Court are supported by substantial evidence of record in the form of affidavits (R. 32-46). See *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 420 (1937); *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U.S. 251, 261 (1936).

(C.C.S.D. Cal. 1900); *Elliott* v. *Rich*, 24 N.M. 52, 172 Pac. 194 (1918); *cf. Wallula Pac. Ry. Co.* v. *Portland & S. Ry. Co.*, 154 Fed. 902 (C.C.E.D. Wash. 1906).

Nevertheless, a conflict of authority developed when the question arose in connection with proceedings before the Interstate Commerce Commission. Prior to enactment of the 1910 amendments to the Interstate Commerce Act (the Mann-Elkins Act, 36 Stat. 552), the Commission had no power to suspend new rates for any period while investigating their lawfulness. In these circumstances, equitable jurisdiction to preserve the status quo pending the Commission's decision was either exercised, or recognized to exist though not exercised because of the particular facts involved, in *Northern Pac. Ry. Co.* v. *Pacific Coast Lumber Mfrs.' Ass'n* 165 Fed. 1 (9th Cir. 1908); *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 Fed. 193 (C.C. N.D. Ga. 1907); *Tift* v. *Southern Ry. Co.*, 123 Fed. 789 (C.C.S.D. Ga. 1903), *aff'd on other grounds*, 206 U.S. 428 (1907); *Kalispell Lumber Co.* v. *Great Northern Ry. Co.*, 165 Fed. 25 (9th Cir. 1908); and *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160 (C.C.D. S.D. 1907); *cf. United States* v. *Michigan Cent. R. Co.*, 122 Fed. 544 (C.C.N.D. Ill. 1903). The contrary view was taken in *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (5th Cir. 1909) (reversing 163 Fed. 738 (C.C.S.D. Ga. 1908)), *aff'd on other grounds*, 215 U.S. 501 (1910); *Wickwire Steel Co.* v. *New York Cent. & H. R. Co.*, 181 Fed. 316 (2nd Cir. 1910); *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (4th Cir. 1910); and *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.*, 171 Fed. 723 (C.C.W.D. Va. 1909), *aff'd per curiam*, 178 Fed 266 (4th Cir. 1910).

Modern decisions have reasserted the traditional equitable jurisdiction, and the courts have frequently intervened in recent years to order maintenance of the status quo during administrative proceedings in order to aid the administrative agency's primary jurisdiction and render its ultimate decision effective. See *West India Fruit & Steamship Co., Inc.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2nd Cir. 1948), *cert. dismissed*, 336 U.S. 908 (1949); *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), *appeal dismissed*, 336 U.S. 941 (1949); *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953); *Pennsylvania Motor Truck Ass'n* v. *Port of Philadelphia Marine Terminal Ass'n*, 183 F. Supp. 910 (E.D. Pa. 1960); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D. N.Y. 1950); *Montana State Federation of Labor* v. *School Dis. No. 1*, 7 F. Supp. 82 (D. Mont. 1934); *State ex rel. Tidewater Shaver Barge Lines* v. *Dobson*, 195 Ore. 533, 245 P. 2d 903 (1952); *cf. Board of Governors of Federal Reserve System* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Flight Engineers' Int'l Ass'n* v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962); *United States Trucking Corp.* v. *American Export Lines, Inc.*, 146 F. Supp. 924 (S.D. N.Y. 1956); *Smith* v. *Highway Board*, 117 Vt. 343, 352-53, 91 A.2d 805, 812 (1952).

The Court below refused to follow these precedents. Starting with the premise that the power to prescribe rates to be charged in the future is a legislative function, it jumped to the conclusion that any suspension or restraint of a proposed rate is also an exclusively legislative function (R. 121). In arriving at this conclusion, which is both a non-sequitur and directly contrary to a number of the cases in the group last cited, it relied on a dictum in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.*, 281 U.S. 412 (1930). In that case the court referred to the conflict in the lower federal court cases as to the propriety of enjoining railroad rates pending decision of the Interstate Commerce Commission and referred with apparent approval to the cases denying the existence of jurisdiction as representing "the weight of decision". The holding in this case, however, was simply that a 10% reduction in intrastate rates, ordered by a state commission and not alleged to be confiscatory, could not be temporarily enjoined pending a decision as to whether such rates unjustly discriminated against interstate commerce. The court was dealing with a delicate problem in the field of federal-state relationships and its decision was based on the inappropriateness of judicial interference with "state action within its normal field, in relation to the domestic concern of transportation exclusively intra-state", in advance of even a preliminary ruling by the Commission that there was unjust discrimination against interstate commerce.

The dictum relied on by the Court below appears to be clearly out of harmony with established equitable principles. It was apparently based on an unwarranted and unfortunate application of the doctrine of primary jurisdiction. That doctrine is basically a rule of convenience adopted by the courts to avoid conflicts with administrative agencies and to insure uniformity in the interpretation and application of regulatory statutes.[5] The reasons for applying the doctrine are wholly absent in the present case where no possible conflict exists between the court and the agency. On the contrary, action by the court is necessary to protect and preserve the primary jurisdiction of the Interstate Commerce Commission by preventing acts which would render that primary jurisdiction ineffective. If the proposed rates become effective, the petitioners' businesses and interests will be destroyed and the Commission will have been rendered powerless to grant them any effective relief.

The choice here presented is between applying a rule of convenience in a situation where the reason for the rule does not exist or applying the equitable rule based on elementary considerations of justice that courts have inherent power to prevent irreparable injury by enjoining presumptively unlawful acts until their lawfulness can be determined.

This conflict was resolved in a related situation in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4 (1942). It was there held that a court reviewing an order of an administrative agency has inherent power, without express statutory authorization, to render its own jurisdiction effective by preserving the status quo pending the outcome of its review. The court stated, in substance, that traditional judicial powers not necessarily inconsistent with the functioning of administrative machinery are not to be deemed abrogated merely because such machinery has been created; only clear and affirmative Congressional action will produce such a result.[6]

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[5] See *United States* v. *Western P. R. Co.*, 352 U. S. 59, 62-65 (1956).

II.

Congress Has Not Abrogated Equity's Inherent Power to Grant Ancillary Injunctive Relief in the Circumstances Here Presented

The court below read Section 15(7) of the Interstate Commerce Act as denying to the courts the power to preserve the status quo after the Commission's power of suspension has been exhausted. Viewing the statute as "model of clarity" (R. 121), it conceived its task to be only to give a literal construction to the words used by Congress. We disagree.[7] In our view, the court below mistakenly read statutory language intended to apply only to the Interstate Commerce Commission as applying also to district courts in the exercise of their equity jurisdiction.

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[6] "The better view thus appears to be that courts of equity, upon the request of an appropriate party, do have jurisdiction to provide temporary injunctive relief during the pendency of hearings before an administrative agency, even though the statute setting up the agency does not specifically so provide. This appears to be in accord with the recent judicial trend." (49 Col. L. Rev. 1128 (1949)).

[7] The dangers of an attempt to find legislative intention through a literal reading of statutory language without reference to its context, the legislative setting in which it and its component parts were enacted, or the incongruous results to which a blind reliance on it would lead, have often been pointed out. *Markham* v. *Cabell*, 326 U.S. 404, 408-09 (1945); *Crosse & Blackwell Co.* v. *Federal Trade Commission*, 262 F.2d 600, 605-06 (4th Cir. 1959); *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489-90 (2nd Cir. 1960); *cf. Boston Sand Co.* v. *United States*, 278 U.S. 41, 48 (1928); *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955).

Section 15(7) provides that the Interstate Commerce Commission can suspend a rate only for a maximum of seven months beyond the time when it "would otherwise go into effect," and that if the Commission does not reach a final decision within the seven months, the proposed rate "shall go into effect at the end of such period." In assessing the intention of Congress in using this statutory language, it is important to note that the second of these quoted phrases found its way into the Interstate Commerce Act 10 years after the first. The legislative history of the statute in which the first phrase had its origin (the Mann-Elkins Act of 1910, 36 Stat. 552) indicates that Congress had no intention of ousting any previously existing equity jurisdiction. The second phrase was added by the Esch-Cummins Act of 1920 (41 Stat. 487) in circumstances which negative any Congressional intention of there dealing with such jurisdiction.

The Mann-Elkins Act amended the then existing Section 15 of the Interstate Commerce Act to empower the Commission, for the first time, to order suspension of a proposed rate or other practice, "but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect," plus a further period, if its hearing was not yet completed, of not to exceed six months.

This language, standing alone, imposes a time limitation only on the Commission. It is entirely consistent with the continued jurisdiction of an equity court to grant ancillary relief, after the Commission's own power of suspension is exhausted. Clearer language than this would be required to deprive equity courts of their traditional ancillary jurisdiction. *Scripps-*

Howard Radio, Inc. v. *Federal Communications Commission, supra.*

Moreover, the legislative setting and history of the Mann-Elkins Act indicate that Congress envisaged the possibility of ancillary relief by equity courts after the Commission's power of suspension was exhausted, and did not intend to deprive the courts of jurisdiction to grant such relief. Prior to the Mann-Elkins Act, as noted above, injunctions had been granted in a number of cases to prevent new rates from going into effect until the Commission had passed on their lawfulness. Some of the courts issuing these injunctions had required sizable bonds, and it was felt that litigation in the courts represented an expensive and difficult remedy. See 45 Cong. Rec. 5844, 5847 (1910).[8] This led to general agreement in Congress that suspension authority should be given the Commission, but disagreement as to what should be its extent. One group, led in the Senate by Senator Elkins, chairman of the Committee on Interstate and Foreign Commerce, wanted to give the Commission such authority for only a limited period in order to encourage it to decide cases as speedily as possible. A second group, led by Senator Cummins, a member of the Committee, wanted to give the Commission authority to suspend until it reached a final decision on the merits. These different approaches were reflected in two rival Senate bills, the Elkins bill, S. 5106, 61st Cong., 2d Sess. (1910) (the pertinent provisions being in Section 9) and the Cummins bill, S. 3776, 61st Cong., 2d Sess. (1910) (the pertinent provisions being in Section 5).

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[8] Relevant excerpts from the debates are shown in Appendix C. See Representative Needham's remarks, Appendix C(1).

The proponents of limited suspension prevailed, but in so doing made clear their belief that if the Commission could not act during the suspension period, injunctive relief could be obtained from the courts in a proper case. The Senate debates indicated some disagreement as to the existence of equitable jurisdiction in such a situation, but made clear that there was no intention to abolish that jurisdiction if it existed. On the contrary, the proponents of limited suspension sought to allay the fears of those favoring indefinite suspension by suggesting specifically that courts could act in appropriate cases to prevent rates from going into effect after the Commission's power to do so was exhausted.[9] During debate on an amendment adding six months to the period for which the Commission could suspend, Senator Jones, its author, stated that at the end of the period the suspended rate would go into effect (45 Cong. Rec. 6916-6917), but he was obviously speaking solely with reference to the authority of the Commission to suspend. This is made clear by the fact that when Senator LaFollette later offered an amendment giving the Commerce Court power to suspend rates, the amendment was defeated after the chairman of the Committee, Senator Elkins, indicated that if the purpose of the amendment was to make possible judicial suspension of rates after the Commission's power was exhausted, it was unnecessary because the courts would have such jurisdiction without it.[10]

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[9] See, in this connection, the colloquy between Senator Cummins and Senator Heyburn at 45 Cong. Rec. 6777, Appendix C(2).

[10] See their colloquy at 45 Cong. Rec. 7260-7263, including Senator Elkins' statement that "Anyone can go into court in a case where irreparable injury is about to be perpetrated and get an injunction." Appendix C(3).

The Esch-Cummins Act of 1920 clearly was not intended to change the situation with respect to the availability of ancillary judicial relief. The pertinent language which it substituted in Section 15 of the Interstate Commerce Act was as follows:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty

> days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period . . ." (41 Stat. 486-487 (1920)).

The effect of this statute was thus to reduce the maximum period for which the Commission could suspend from 120 days plus an additional 6 months to 120 days plus an additional 30 days. The reason for this reduction was, as made clear during Congressional debate, that the same statute created a new transportation board to assume some of the functions previously performed by the Commission, and it was felt that the Commission therefore could dispose more rapidly of cases before it.

That Congress in enacting the Esch-Cummins Act had no intention of legislating with respect to the powers of the courts is indicated both by the statutory language and by its legislative history. As to language, the words "the proposed change of rate . . . shall go into effect at the end of such period" were so placed as to follow directly words in the same sentence dealing with the power of suspension to be exercised by the Commission, indicating a reference to a sequence of events in terms of Commission action alone. As to history, the Esch-Cummins Act was the out-growth of two similar bills in the House and Senate. The House bill was the one enacted, but Section 44 of the Senate bill contained language almost identical with that quoted above. In explaining this portion of Section 44 on the Senate floor, Senator Cummins, at this time the chairman of the Senate Committee on Interstate and Foreign Commerce, stated:

> "The next section to which I call your attention is section 44, and in that section the only change

> that is of importance at this moment is in the length of time that the commission may suspend rates which are filed by the carrier" (59 Cong. Rec. 143 (1919)).[11]

If the Committee had intended to take away any of the equitable powers of the courts, its chairman certainly would not have said that the change in the length of time the Commission might suspend rates was the only change of importance effected by the change in language.

The maximum period for which the Commission may suspend was increased to seven months by the Mayfield-Newton Act of March 4, 1927 (44 Stat. 1446). An incidental result of the substitution of a seven-months' suspension period for an initial period of 120 days followed by a possible further period of 30 days was to begin a new sentence with the words "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period" (44 Stat. 1448 (1927)). The fortuitous inclusion of this language in a separate sentence no longer containing a reference to the Commission's suspension power has tended to give it, when read without knowledge of its history, an independent flavor that does not reflect the Congressional intent. Congress, when originally adopting it, had no intention of interfering with the jurisdiction of an equity court to intervene after the suspension power of the Commission was exhausted, and such an intention should not now be read into it.

That Congress did not intend to oust equity jurisdiction in the type of situation here presented is further indicated by a consideration of Section 15(7) in the light of related statutory provisions. Such provisions include the National Transportation Policy, that portion of Section 22(1) of the Interstate Commerce Act which preserves common law remedies, and the statute providing for judicial review of Interstate Commerce Commission decisions.

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[11] See Appendix C(4) for complete text.

The National Transportation Policy, adopted by Congress in 1940, is

> ". . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy". (54 Stat. 899, 49 U.S.C., Note preceding § 1).

This Policy was enacted as part of the Transportation Act of 1940 (54 Stat. 899), which placed water carriers under the jurisdiction of the Commission. While the legislation was under consideration, fears were expressed in Congress that the Commission was "railroad-minded" and would so regulate water carriers as to prevent them from competing effectively. The National Transportation Policy was adopted for the purpose of setting these fears at rest. As stated in *Arrow Transportation Co. v. United States, supra:*

> "The legislative history of this statutory provision . : . shows that many members of Congress were apprehensive that the Commission would so exercise the regulatory powers conferred by the Transportation Act of 1940 as to prevent water carriers from competing effectively with the railroads. The act was passed only after repeated assurances that these fears were groundless because the Commission would be bound by the provisions of the National Transportation Policy.
>
> "There was extensive debate as to whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere. To eliminate any question on this score, Congress adopted the Whittington amendment, which provides that: 'All of the provisions of this (the Interstate Commerce) Act shall be administered and enforced with a view to carrying out the above declaration of policy' (54 Stat. 899 (1940), 49 U.S.C.A. note preceding Section 1).
>
> "Congress thus made clear that it was imposing on the Commission a positive and active duty to administer each provision of the act in such a way as to preserve the inherent advantages of each mode of transportation." (176 F. Supp. at 416).

In short, Congress, with the issue squarely before it, took action to protect water carriers from "destructive competitive practices" and to insure that "a national transportation system by water . . ." and other means should be preserved. Certainly, this announced Congressional purpose should be taken into account in construing Section 15(7), where such construction will go far to determine whether the Congressional purpose of outlawing the very type of destructive competitive practices here being employed is to be accomplished or defeated. *Cf. Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309 (1911); *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277 (1942); *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940). Here, the Commission, after stating in writing that there was reason to believe that the tariffs would "constitute unfair and destructive competitive practices in contravention of the National Transportation Policy", exercised fully its statutory authority to prevent the proposed rates from going into effect by ordering them suspended for the maximum period for which it could order suspension. The hearings were not completed within the suspension period; the Commission's suspensory jurisdiction had been invoked and spent and the Commission was powerless further to prevent the rates from becoming effective; some of the petitioners were faced with impending bankruptcy; and the National Transportation Policy was about to be emasculated. The Court below, however, in the face of the Congressional declaration that "all provisions of the Act" shall be administered and enforced to carry out the Policy, interpreted Section 15(7) of the Act as rendering an equity court helpless to prevent the violation of the Policy and the irreparable injury such violation would inevitably inflict. We think that in so doing it departed from established principles of statutory construction.

Also of relevance in the construction of Section 15(7) is that part of Section 22(1) of the

Interstate Commerce Act (24 Stat. 387; 49 U.S.C. §22(1) which provides that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." This language was obviously used in a broad sense, and "remedies . . . at common law" include equitable remedies such as injunctions. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900); *Martin* v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917).

Southern claims, and the Court of Appeals held, that at common law the railroads were at liberty to maintain unreasonably low rates "provided they were non-discriminatory" (R. 122). The key to that conclusion is the proviso. The proposed rates are grossly discriminatory against petitioner city of Guntersville and shippers located there and are plainly preferential to localities and shippers at Memphis, St. Louis, and other Ohio and Mississippi River ports. By according those ports and shippers greatly reduced rates while denying them at Guntersville, Southern would kill Guntersville as a barge grain reshipping port and would bankrupt elevators located there. Southern has stated on the record that it would make available from Guntersville rates constructed upon the same "formula" as the proposed rates. But, that formula is so constructed that even if such rates were published they would not cure the patent discrimination. The scheme of an extremely low per ton-mile factor, coupled with a uniform terminal factor and heavily influenced on short hauls by a 240-cent minimum rate, would still result in a relationship highly discriminatory to the Tennessee River ports.

In addition, the proposed rates are grossly discriminatory against receivers who are not in a position to make use of multiple-car shipments, and whose rates would be two and one-half times those paid by their competitors receiving grain in multiple-car lots.

Equity exercised jurisdiction to restrain discriminatory rate practices at the suit of aggrieved shippers prior to enactment of the Interstate Commerce Act.[12] Railroads were regarded as recipients of special privileges, subject to a special obligation to exercise such privileges in the interest of the public, and under a common law obligation to transport commodities at reasonable rates without discriminating among shippers. *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U.S. 386 (1892). They "exercise a sort of public office, and have duties to perform in which the public is interested". *Munn* v. *Illinois*, 94 U.S. 113, 130 (1876).

At common law, some of the petitioners, at least, would thus have had a legal right to be protected from rail rates, high or low, which discriminated against them in favor of other shippers and communities. It seems unnecessary, therefore, to consider whether a competing carrier had a common law right to be protected against unfair and destructive competition—from below-cost rates published by a competitor—

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[12] In *Coe & Wilson* v. *Louisville & N. R. Co.*, 3 Fed. 775 (C.C. M.D. Tenn. 1880), the railroad was enjoined from discriminating among receivers of livestock: "If the railroad corporation possess such right (to be free of judicial restraint), they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive" (p. 779). See also *Menacho* v. *Ward*, 27 Fed. 529 (C.C.S.D. N.Y. 1886) (common carrier steamship line enjoined from exacting higher rates from shippers who refused to patronize it exclusively).

which Congress, in the National Transportation Policy, has subsequently declared unlawful. Equity had jurisdiction prior to the Act to restrain discriminatory rates, and the express restriction of Section 22(1) of the Act establishes that Congress intended to preserve the pre-existing equitable remedy in a case like this where alternative remedies available from the Commission have been exhausted.[13]

The third related statute mentioned above, authorizes judicial review of Commission decisions, specifically empowering the courts to stay the operation of a proposed new rate after a Commission decision upholding it and pending judicial determination as to whether the decision was correct (62 Stat. 970; 28 U.S.C. § 2324-2325). It would be incongruous indeed if such a proposed rate could not also be judicially stayed prior to a final Commission decision, while the Commission's finding that there is reason to believe the proposed rate unlawful is in effect. The need for protecting those affected by the proposed rate is as great in the one case as in the other.

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[13] This Court held in *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), that section 22(1) does not authorize a court to oust Commission jurisdiction by holding unreasonable a rate whose reasonableness has never been submitted to the Commission at all, since such authorization "would be absolutely inconsistent with the provisions of the act" and "the act cannot be held to destroy itself" (p. 446). But this is only another way of saying that primary jurisdiction is in the Commission. The traditional remedy of a temporary injunction to prevent irreparable injury by preserving the status quo pending a determination of the reasonableness of a rate, where the Commission's power of suspension has been exhausted, would seem clearly to have been saved by Section 22(1) if it is not to be read out of the statute altogether.

In summary, a basic purpose of Congress in the Interstate Commerce Act and related statutes was to protect parties who would be injured by improper action of a common carrier. Section 15(7) should be construed to help accomplish the Congressional purpose and not to defeat that purpose through a narrow and technical reading of language without reference to its origin and development.

The only case we have found involving the precise issue here presented is *Pacific Inland Tariff Bureau* v. *United States, supra.* There the Commission had suspended proposed rate reductions for the full seven months period. A few days before the suspension period expired, plaintiffs sought a status quo injunction pending final action by the entire Commission on plaintiff's motion to reconsider an order of Division 2. A single judge temporarily enjoined the railroads from putting the reduced rates into effect. Several months later, the Commission affirmed Division 2's actions and plaintiffs promply sought judicial review. The railroads' claim that the single judge lacked power to issue the status quo injunction at the end of the suspension period was rejected by the three-judge court. See also *Cantlay & Tanzola* v. *United States, supra.*

III.

To Construe Section 15(7) as Prohibiting Ancillary Injunctive Relief Would Raise Grave Constitutional Difficulties

If the language of Section 15(7) that rates "shall go into effect at the end of such period" is construed to forbid a status quo injunction where, as here, that injunction is petitioners' only remedy to prevent their businesses from being destroyed, such construction would raise grave constitutional difficulties.[14] Statutes, of course, are to be construed to avoid constitutional difficulties, and, despite broad language in a statute, courts will "apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law'" *Anniston Manufacturing Co.* v. *Davis*, 301 U.S. 337, 351-2 (1937).[15]

That a business or occupation is property within the protection of the due process clause of the Constitution is well settled. *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* v. *Corporation Commission*, 278 U.S. 515, 519-20 (1929). If Section 15(7) be construed as prohibiting ancillary injunctive relief where, as here, the Commission's jurisdiction to prevent the rates from becoming effective has been exhausted, then petitioners' businesses will be destroyed, and their properties and facilities, and Arrow's certificate as a common carrier will be rendered worthless, all without adequate legal remedy (R. 58), and all without administrative or judicial determination of the lawfulness of the rail rates causing such destruction. Such a result would constitute deprivation of property without due process of law. *Oklahoma Natural Gas Co.* v. *Russell, supra,* 261 U.S. 291, 293 (1923); *Pacific Tel. & Tel. Co.* v. *Kuykendall, supra,* 265 U.S. 196, 201, 204-05 (1924); *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U.S. 418, 458 (1890); *Pacific Inland Tariff Bureau* v. *United States, supra,* 129 F. Supp. 472, 477 (D. Ore. 1955). See also Daniel Webster's argument in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (U.S.) 518, 581 (1814).

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[14] *Bronemann* v. *United States*, 138 F.2d 333, 337 (8th Cir. 1943); *Miller* v. *Howe Sound Min. Co.*, 77 F. Supp. 540, 543-5 (E.D. Wash. 1948); *Frye & Co.* v. *Vierhus*, 12 F. Supp. 597, 600 (W.D. Wash. 1935); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2nd Cir. 1948), *cert. denied*, 335 U.S. 887 (1948); *Eastern States Petroleum Corp.* v. *Rogers*, 280 F.2d 611, 614 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960); *A.P.W. Paper Co. Inc.* v. *Riley*, 12 F. Supp. 738, 741-2 (N.D. N.Y. 1935); *Inland Milling Co.* v. *Huston*, 12 F. Supp. 554, 555 (S.D. Ia. 1935); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 431 (1931); *Cary* v. *Curtis*, 3 How. (U.S.) 236, 250 (1845); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 293 (1923); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-5 (1924); *Porter* v. *Investors Syndicate*, 286 U.S. 461, 469, 470-1 (1932); Hart & Wechsler, *Federal Courts and the Federal System*, pp. 288-340 (1953).

[15] See also: *United States ex rel. Atty. Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-8 (1909); *Porter* v. *Investors Syndicate*, *supra*, 286 U.S. 461, 470 (1932); *Lockerty* v. *Phillips*, 319 U.S. 182, 188-9 (1943); *Lynch* v. *United States*, 292 U.S. 571, 586-7 (1934); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 509-10 (1956).

CONCLUSION

The Court below erred in holding that the District Court did not have jurisdiction to issue a temporary injunction to maintain the status quo in the situation presented here. It should have declared that when the Commission's powers are exhausted, a federal equity court, upon a showing of irreparable loss, damage, and injury, may temporarily enjoin presumptively unlawful rates at the end of the suspension period in aid of the Commission's jurisdiction and in furtherance of the National Transportation Policy.

Its error in this regard resulted from the failure to heed the basic principles of statutory construction set out by Mr. Justice Stone in *United States* v. *Morgan,* 307 U.S. 183 (1939):

> . . . in construing a statute setting up an administrative agency and providing for judicial review

> of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim (p. 191).

We respectfully submit that the judgment of the Court of Appeals should be reversed and the case remanded to the District Court for further proceedings.

Respectfully submitted,

John C. Lovett
Lovett and Lovett
Benton, Kentucky

Donald Macleay
Macleay, Lynch, Channing & Bernhard
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioners

Of Counsel:

Sirote, Permutt, Friend and Friedman
First Federal Building
Birmingham, Alabama

Joe Starnes, Jr.
City Attorney
Guntersville, Alabama

APPENDIX A

Interstate Commerce Act, Section 15(7) (44 Stat. 1447-1448, as amended), 49 U.S.C. § 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all

> amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Interstate Commerce Act, Section 22(1), (24 Stat. 387, as amended), 49 U.S.C. § 22(1), second restriction:

> ". . . and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; . . ."

Interstate Commerce Act, National Transportation Policy (54 Stat. 899), Note preceding 49 U.S.C. § 1:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without

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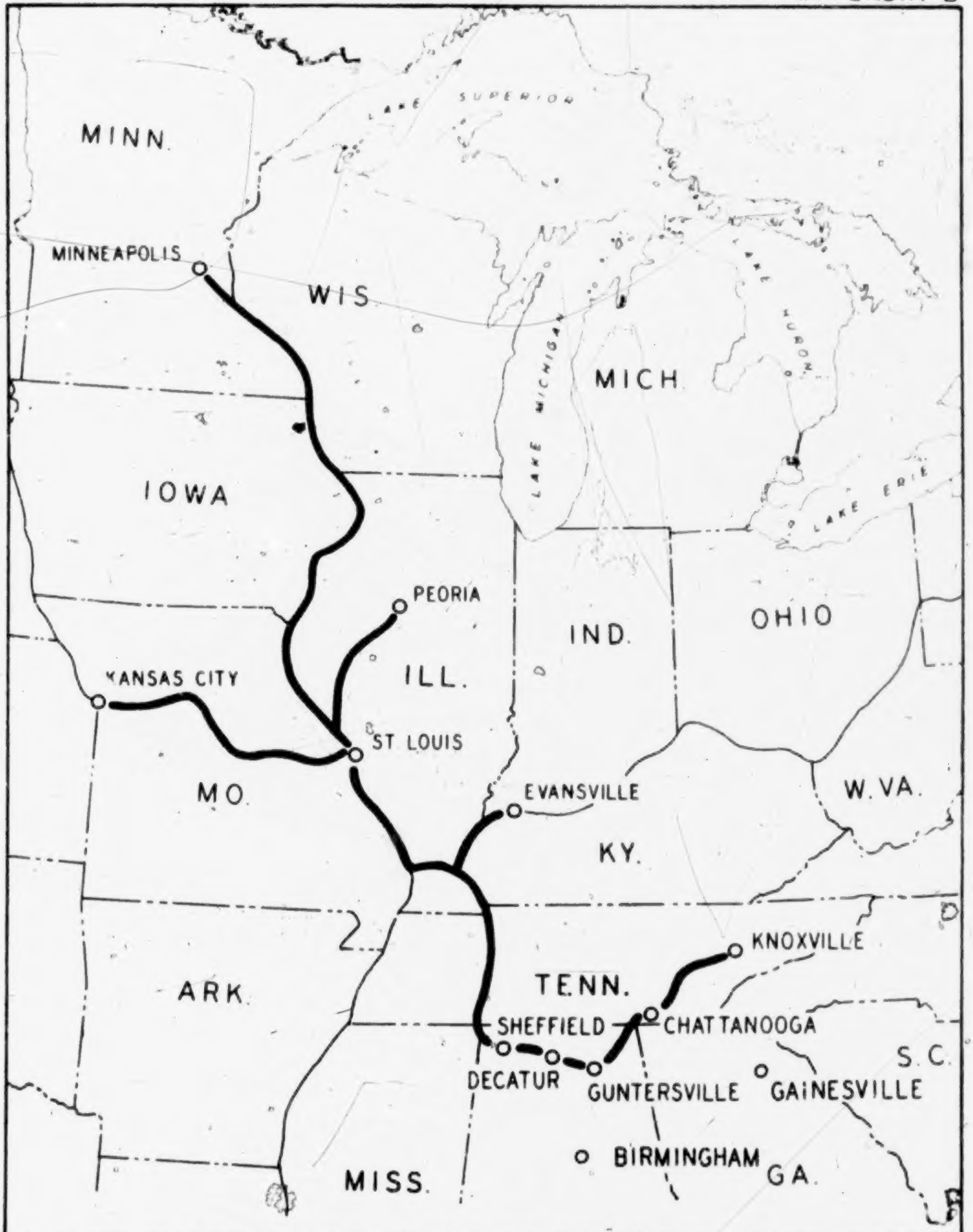
unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."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SHEFFIELD
CHATTANOOGA
DECATUR
GUNTERSVILLE
GAINESVILLE
S.C.
BIRMINGHAM
MISS.
GA.

CHART SHOWING LOCATIONS OF TENNESSEE RIVER PORTS AND REPRESENTATIVE BARGELINE PORTS OF LOADING FOR GRAIN

APPENDIX C

(1) Excerpts from remarks of Representative Needham in debates on Mann-Elkins Act, May 5, 1910, in the House of Representatives, 45 Cong. Rec. 5847:

> "Mr. Chairman, in my opinion, this provision is one of the most important, if not the most important, provision of the bill which we are now considering. There has been a general demand that the Interstate Commerce Commission should be clothed with power to suspend the operation of a rate, classification, regulation, or practice which the railways seek to put in operation until the reasonableness or justness of such new rate, classification, regulation, or practice can be determined.
>
> "As the law now stands a railroad company can increase a rate or inaugurate a new classification, regulation, or practice, any one of which may be an increased burden upon the shipper, and the Interstate Commerce Commission is powerless to suspend its operation until after the rate, classification, regulation, or practice has been put in operation, whereupon the shipper can institute a proceeding before the commission to test the reasonableness or justness of such new burden. The remedy which the shipper now has is both to go into court and enjoin such contemplated action by the railroad company, and thereafter bring his action before the Interstate Commerce Commission.
>
> "In the Sixtieth Congress and in the present Congress I introduced a bill the object of which was to accomplish the same purpose as is sought to be accomplished by the language now under consideration. It seems a useless and unnecessary expense to compel a shipper to go into court and enjoin the railroad company whenever he desires to prevent the inauguration of a new rate, classification, regulation, or practice, and it seems but reasonable to clothe the Interstate

Commerce Commission with the power in the first instance to suspend such action on the part of the carrier until the justness or reasonableness of the contemplated action may be heard and determined."

(2) Colloquy between Senator Cummins, proponent of unlimited suspension, and Senator Heyburn, proponent of limited suspension, in the Senate, May 24, 1910, 45 Cong. Rec. 6777:

"Mr. Heyburn. The Senator is discussing one of the most important phases of the question under consideration, and I want to ask him whether he has given consideration—I presume he has, but I would like to know the result—to the question whether or not at the stage of the proceedings just pictured by the Senator, where the railroads would bring in such a vast mass of material as to make it impossible for the decision to be rendered within the limit, the parties might not go into a court of equity, and, setting forth those facts, ask that the rates be not put in force because of the wrongful act of the railroad company.

"Mr. Cummins. I have very grave doubt about the right of any shipper to institute a suit of that kind, but if he could it would be almost impossible for a court to find in the exercise of an absolute right upon the part of the railway companies any such invasion of the privileges of the shipper as to warrant the interven[illegible]f a court.

"Mr. Heyburn. I should like to suggest—

"Mr. Cummins. If you will just allow me. But if that were so, I for one am not by my vote going to put any such burden upon the shippers of the country. I do not intend to drive them into any such litigation as is suggested, and which was suggested, as the Senator from Idaho will remember, on last Thursday by another distinguished member of this body. But whatever may be the legal merits of the proposition it is unfair and unjust to require of the shippers of the United States recourse to a litigation of the kind.

"Mr. Heyburn. I should like to make one suggestion. The Senator will remember we have carried forward the present jurisdiction of the United States circuit courts for certain purposes outside of and beyond the jurisdiction that we have specifically conferred upon the new court, the court of commerce, and a shipper may now appeal to the circuit court, and that right is not taken away from him by any provision in this bill, where he is being unfairly dealt with."

(3) Text of Senator Elkin's statement in the Senate, June 2, 1910, 45 Cong. Rec. 7262-7263:

"Mr. Elkins. The Senator wants to enjoin and set aside a rate that has not gone into effect pending the determination by the commission whether it shall become effective. Suppose the commission were to decide in favor of the shipper. You do not know. How can you enjoin a body or commission that has discretion, that has the right to decide a question, before it has decided and pending a hearing? The question has not been determined. It has not been decided. The amendment says 'pending a final determination.' Now, the Senator wants the carrier enjoined from doing what? From advancing rates? Suppose an application is made by the carrier to advance the rate. The commission upon complaint of the shipper opposes the advance and takes one hundred and twenty days in which to determine the question, and if it has not reached a conclusion in the meantime, then under this bill the commission may take six months more, making eleven months in which to determine it. A suit to enjoin could not be maintained and follow this amendment. It is impossible. It says:

Pending a final determination by said commission as to the reasonableness of such rate or rates in a then pending proceeding before said commission.

"The court can not enjoin a tribunal having the power and discretion to decide a case before it is decided. It is impossible. I submit that a court could not be asked to enjoin the commission, because no one can tell which way the commission will decide until it does decide. Nobody knows. This amendment says 'pending a final determiantion.' The rate does not go into effect until the final determination.

"We will take the case of an application on the part of the carrier to advance a given rate 10 cents a hundred. The shipper objects to it, and says it is unjust. The commission, under this bill, suspends the rate pending final determination. There is no court in the world that can reach the commission pending this final determination. You could not bring a suit to set aside, suspend, or enjoin. The court could not get jurisdiction of it, because it is not a determined question. I doubt if it could after the commission has decided against the shipper, because the commission is the legislative agent of the Government. The railroad can enjoin if the order is confiscatory. But you can not work it out under this amendment at all that the shipper can enjoin pending the hearing. There is no legal machinery to do it.

"If anyone deprives a citizen or any common carrier or anybody else of property without due process of law or without compensation, in violation of the fifth amendment, the aggrieved party has a right to go into any of the courts of the United States and seek relief. The same is true in the case of any irreparable injury. Anyone can go into a court in a case where irreparable injury is about to be perpetrated and get an injunction. I submit it is impossible to carry out in the courts what is in the Senator's mind through the wording of this amendment."

(4) Text of Senator Cummins' statement in the Senate on December 4, 1919, 59 Cong. Rec. 143:

"The next section to which I call your attention is section 44, and in that section the only change that is of importance at this moment is in the length of time that the commission may suspend rates which are filed by the carrier.

"As the law now is, each carrier has a right, and is required, if it desires to change the rates, to file its schedule of rates with the Interstate Commerce Commission. The commission can then, upon summary investigation or inquiry, suspend those rates pending an investigation. Under the law as it is it has the authority to suspend them for 120 days, and then it was given the authority, as I recollect it, if it did not finish the inquiry within that time, to extend the time for another period of six months. The latter period has been shortened in this bill to a period of 30 days.

"The reason for that is this: In the first place, the Interstate Commerce Commission has been overworked. There is no body of men in the employ of the Government, or exercising governmental functions, upon which so great a weight of labor has fallen as the Interstate Commerce Commission, and it is utterly impossible for it to fulfill its full duties as the law now is. But we have undertaken in this bill to create a new governmental function known as the transportation board, and we have given to that board many of the important duties which are now performed by the Interstate Commerce Commission, and endeavored in that way to relieve the latter body of some of its labor; and we hope that we have accomplished that purpose to such an extent as that the commission will be able promptly to decide all the matters which are brought before it.

"Broadly speaking, we have left with the Interstate Commerce Commission what might be described as semi or quasi judicial powers, rate making in all its phases, the valuation of railroad property in all its aspects, accounting absolutely necessary as an incident to rate making and to valuation. These are in the main the great branches of labor which are left with the Interstate Commerce Commission. The purely administrative duties, those duties which have to do with the physical operation of the railway properties, are transferred to the transportation board and many new duties are also given to the transportation board, one of which and probably the most important of which I commented upon yesterday.

"In view of this division of labor between the commission and the transportation board, the committee is of the opinion that the commission ought to pass upon the rates which are filed with it by the carriers at least within a period of five months. It is not fair either to the shipping public or to the carriers that a proposal for an increase or decrease of rates, as the case may be, shall remain uncertain and undisposed of for a period of more than five months. The provision is a limit of 120 days in the first instance, and then an extension, if necessary, of 30 days.

"In the latter part of section 44 there is another very important change in the law which I want Senators to observe. Under the interstate commerce act which now is, as you all know, the shipper may determine the route which his traffic shall take. It has been rather common in the past for railroad companies which were not satisfied with the routing which the shipper had determined upon to deliberately and knowingly divert it to some other line with which the initial carrier or some connecting carrier had more intimate relations than with the carrier over whose lines the shipper determined his traffic should go. There has been no remedy for that, and it has been practiced mainly at the expense of the short or weaker lines.

"The committee determined to correct it and has corrected it by providing that the line from which the traffic is thus diverted shall be entitled to recover its proportion of the earnings from the through rate just the same as if it had carried the traffic, and the line over which the traffic may actually go wrongfully will have the satisfaction of doing the business for nothing, a penalty which I think will very soon bring to an end this very objectionable practice."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY, a corporation,
JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF STATESVILLE FLOUR MILLS

WHITEFORD S. BLAKENEY
1410 North Carolina
National Bank Building
Charlotte 2, North Carolina
Attorney for Statesville Flour Mills

Of Counsel:

COLLIER, HARRIS & COLLIER,
207 Spainhour Building,
Statesville, North Carolina

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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ARROW TRANSPORTATION COMPANY, a corporation,
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CITY OF GUNTERSVILLE, ALABAMA,
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v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

MOTION OF STATESVILLE FLOUR MILLS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Statesville Flour Mills of Statesville, North Carolina, files this its Motion for Leave to File a Brief Amicus Curiae in this proceeding and for cause states:

1. Statesville Flour Mills is a manufacturer of flour and feed and a large consumer of grain and as such has a substantial monetary interest in the outcome of this proceeding.

2. Statesville Flour Mills participated extensively in the proceeding before the Interstate Commerce Commission and it desires this Court to know the effect that will be produced upon the grain receiver and processor if the view of the petitioners is adhered to. Statesville's position will not be adequately represented by any other party hereto.

WHEREFORE, Statesville Flour Mills moves that the Court grant it leave to file its Brief Amicus Curiae, copy of which is attached. This Motion dated at Charlotte, North Carolina, this 10th day of December, 1962.

Respectfully submitted,

WHITEFORD S. BLAKENEY
1410 North Carolina
National Bank Building
Charlotte 2, North Carolina
Attorney for Statesville Flour Mills

Of Counsel:

COLLIER, HARRIS & COLLIER,
207 Spainhour Building,
Statesville, North Carolina

IN THE

Supreme Court of the United States

October Term, 1962

No. 430

Arrow Transportation Company, a corporation,
O. J. Walls, d b a O. J. Walls Company, a corporation,
John D. Bagwell Farms and Hatchery, Inc., a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company, a corporation,
St. Louis-San Francisco Railway Company, a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents

BRIEF OF STATESVILLE FLOUR MILLS AS AMICUS CURIAE

Statesville Flour Mills of Statesville, N. C., files this brief for the purpose of apprising the Court of the effect that adoption of the petitioners' view of Section 15(7) of the Interstate Commerce Act would have on millers and processors such as Statesville. A ruling here in favor of the petitioners would have dire effects on Statesville's operation and on that of many other millers and receivers of grain in similar circumstances.

As the affidavit of W. Herman Clark, Traffic Manager of Statesville Flour Mills, shows (R. 28), Statesville

Flour Mills has substantially changed its position in reliance upon the explicit language of Section 15(7) by making large purchases of grain in anticipation of using the proposed reduced rail rates which were expected to become effective in August 1962.

The action of this Court in granting the restraining order against the proposed rates and the possibility that this Court might further enjoin those rates have injected the most paralyzing uncertainty into the day to day business operations of this company. That uncertainty has been compounded due to the granting of the writ of certiorari with its consequent additional but not forecastable delays. In our particular business and in any other business like it, plans have to be made in advance for our supply of raw material, principally wheat and corn.

We believe and we urge upon this Court that Congress intended to limit this period of business uncertainty to seven months. For in a case as complex and lengthy as the one before the Interstate Commerce Commission in this instance, if any individual party or small group of parties has it within their power, by whatever claim, to obtain from some federal court an injunction, this means that all the other parties and persons with a direct interest in the case and in the specific rate action can be hamstrung without limitation and that this period of business uncertainty can be extended beyond all foreseeable limits.

Congress, we submit, had not in mind merely the interests of competing carriers when it wrote Section 15(7) into the Interstate Commerce Act. Congress had in mind surely the vast general public of which we are a member. Congress left intact the carriers' right (and duty) to initiate rates and it decided in its wisdom to cast the burdens and losses on the proponent carriers for seven months and for that time only; and it further decided that after the expiration of that period the public, in the case of a rate increase, would have to go ahead and pay it; and in the case of a reduction, the public thereafter would be entitled to claim it.

The view to the contrary asserted here by the petitioners can only lead to confusion compounded. For those of us who are caught in this carrier controversy, our losses—due to business actions which had to be taken and which were taken in reliance upon the plain words of the statute—and the monetary savings being denied us because the rail reductions have not been made effective, these losses are to be cast wholly upon us in the view of the petitioners. It is we and people like us, the general public, who have businesses to operate that have no remedy here. Certainly there is no remedy available to us against those parties, small in number and small in interest in this huge proceeding, who have already been responsible for denying us substantial monies for these many months since August 1962.

For the above reasons, the uncertainty that would be injected, the chaos and business confusion that would result and the unfairness of denying to Statesville Flour Mills and others similarly situated the proposed rates when there is no way to recoup those losses, it is submitted that the view of petitioners with regard to Section 15(7) is erroneous and that this Court should hold that the statute is clear and precludes the relief sought by petitioners.

Dated at Charlotte, N. C., this 10th day of December, 1962.

Respectfully submitted,

WHITEFORD S. BLAKENEY
1410 North Carolina
National Bank Building
Charlotte 2, North Carolina
Attorney for Statesville
Flour Mills

Of Counsel:

COLLIER, HARRIS & COLLIER,
207 Spainhour Building,
Statesville, North Carolina

MOTION FILED DEC 12 1962

IN THE

Supreme Court of the United States

October Term, 1962

No. 430

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company, a corporation,
John D. Bagwell Farms and Hatchery, Inc., a corporation,
City of Guntersville, Alabama,
Petitioners

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company, a corporation,
St. Louis-San Francisco Railway Company, a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WALLEY MILLING COMPANY

John W. Vardaman
1014-17 Commercial National
Bank Building
Anniston, Alabama
Attorney for Walley Milling Company

Of Counsel:

Merrill, Merrill, Vardaman
& Williams
1014-17 Commercial National
Bank Building
Anniston, Alabama

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY, a corporation,
JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

MOTION OF WALLEY MILLING COMPANY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Walley Milling Company of Oxford, Alabama, files this its Motion for Leave to File a Brief Amicus Curiae in this proceeding and for cause states:

1. Walley Milling Company is a receiver of grain from the middle west and as such has a substantial pecuniary interest in the outcome of this proceeding.

2. Walley Milling Company has a medium-sized feed manufacturing and poultry growing operation located in the same general area as petitioner John D. Bagwell Farms and Hatchery, Inc.

3. As a receiver of grain, and as a potential receiver of grain by rail under the proposed rates, Walley Milling Company fears that its interest and that of the public similarly situated is apt to be lost in the present controversy before this Court, which controversy has taken on the aspect of a fight between carriers; and that no party is likely to adequately represent the interest of Walley Milling Company or of other receivers of grain similarly situated.

Wherefore, Walley Milling Company moves that the Court grant it leave to file its Brief Amicus Curiae, copy of which is attached. This Motion dated at Anniston, Alabama, this 10th day of December, 1962.

Respectfully submitted,

John W. Vardaman
1014-17 Commercial National
Bank Building
Anniston, Alabama
Attorney for Walley Milling Company

Of Counsel:

Merrill, Merrill, Vardaman
& Williams
1014-17 Commercial National
Bank Building
Anniston, Alabama

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY, a corporation,
JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF OF WALLEY MILLING COMPANY AS AMICUS CURIAE

Walley Milling Company is a receiver of grain and a manufacturer of feed and by no wise a large one. It is located at Oxford, Ala., in north Alabama, in which area certain of the petitioners are also located.

Walley Milling Company receives most of its grain from the midwest from states as far away as Michigan and Iowa. Only 10 percent of its grain has ever been on a barge. Although Walley Milling Company is located only sixty miles from the Tennessee River port of Guntersville, 90 percent of the grain received by it arrives direct from the midwest by itinerant and unregulated truck, the rates and charges of which the Interstate Commerce Commission has no control at all (affidavit of Dewey E. Walley, Vice President of Walley Milling Company, R. 24).

It is not our purpose here to offer argument which other parties will undoubtedly make but to point out to this Court the specious nature of the claim of the petitioners. This can readily be seen in the results that would flow from the adoption of their view, results absurd enough in themselves to show that Congress could never have intended what petitioners seek. We leave it to others to brief the technicalities; our purpose is to deal with practicalities.

The suspension proceeding, still before the Interstate Commerce Commission, was a long and complex proceeding with a multitude of contending parties. It was not, and is not, merely a controversy between barges and railroads but it is a proceeding in which large numbers of various segments of the public participated fully—receivers and processors of grain, merchants of grain, boards of trade, cooperative groups, millers, farmers, elevator operators, state regulatory bodies, etc.

The record before the Commission shows conflicting claims as to the amount and the percentage of grain being trucked into the South. In our own case, the barge lines are a very small factor in the transportation to our mill, almost all of our grain being received by truck.

Can it be that an injunction lies to protect certain large grain merchants located on the Tennessee River, a handful of which dominate the grain that is water-arrived, when we—Walley Milling Company and those of the general public similarly situated—are being denied substantial transportation savings that would mean thousands of dollars a year to us? If such injunction lies, there is no remedy either under the statute or at common law for Walley Milling Company, and there is no remedy for the other thousands of people and businesses similarly situated.

The barge lines contend that they have no remedy. While we cannot for a moment concede this to be true, it is true that large segments of the general public who are on the other side of this case from the petitioners can make the same but much more plausible claim. It is our view that no body except the Interstate Commerce Commission, after full hearing and deliberation, is in a position to balance the myriad equities here to find where lies the greater equity. That function belongs to the Commission and to that body alone.

The reason for this is clear. In a case such as this, one of wide geographic interest, participants come from areas far removed from the area served by the respondent Southern railroads. Almost any federal court could be resorted to. The interest of a competing carrier would be entirely different from the interest of a miller or of a grower. Indeed, it is conceivable that many various interests would be in conflict, all with one another. One of this varied group might always be in a position to prove imminent damage. These many courts cannot be expected to view this proceeding with the single-eyed view of the Interstate Commerce Commission. That is far too much to expect. Chaos would be the result. The biggest binge of forum-shopping in history would be unleashed.

In a complex case of this kind where interests inevitably conflict, the result, if the petitioners are upheld, would be that the 95 percent of the public who would benefit from a rate reduction could have it denied them by the 5 percent of the public who would not so benefit. No court could be expected to weigh all the conflicting claims and arguments. Certainly it would be onerous beyond belief to expect all parties who had been before the Interstate Commerce Commission to follow each court case and to participate fully. There are hundreds of small people, people who are those that are meant by the "public" part of the term "public interest", who have a difficult enough time getting their views before the Interstate Commerce Commission. It cannot be expected of them either to forego their rights or to follow various court proceedings in advance of a ruling by the Interstate Commerce Commission on the very question presented, the lawfulness of the rates.

It is our view, and the only view that will stand up under analysis, that Congress meant quite plainly that the I.C.C. was the body entrusted to ascertain the reasonableness of the rates, both increases and reductions, and that that body could prevent rate action by a carrier for seven months' time and no longer. To suggest that a court may enjoin a rate prior to the Commission's examination of it and findings as to it is to suggest that the courts are themselves empowered to find a rate unreasonable in advance of the Commission's own action.

If the view of the petitioners prevails, Walley Milling Company must continue to sustain a loss of $50,000-$75,000 a year, money which the statute clearly provides that we are entitled to. Congress has said that we can be denied a reduction for seven months but not for a longer period unless the Commission has ruled the rate illegal. Carrier-initiated rates are presumptively legal until found to be otherwise. The seven-month period has long since expired. The financial burden continues to be thrust upon us and there is no way for us to recoup this—to us—large sum. For the public there is indeed no remedy. It cannot be that Congress intended the interest of a carrier or even of a group of carriers to transcend the interest of the general public.

WHEREFORE, Walley Milling Company respectfully submits that this court affirm the decisions of the courts below.

Respectfully submitted,

JOHN W. VARDAMAN
1014-17 Commercial National
Bank Building
Anniston, Alabama
Attorney for Walley Milling Company

Of Counsel:

MERRILL, MERRILL, VARDAMAN & WILLIAMS
1014-17 Commercial National
Bank Building
Anniston, Alabama

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No. [illegible]

In the Supreme Court of the United States

October Term, 19[illegible]

[illegible] Company, et al., petitioners

v.

[illegible] Company, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

[illegible]

[illegible]

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, ET AL., PETITIONERS
v.
SOUTHERN RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of the Court, dated October 15, 1962, inviting the Solicitor General to set forth the views of the United States. The Interstate Commerce Commission does not join in the conclusions herein expressed.[1]

OPINIONS BELOW

The opinions below have not been officially reported. The memorandum opinion of the district court, dated August 2, 1962, appears at R. 52–55. The district court's findings of fact, conclusions of law and order denying petitioner's motion for preliminary injunction, dated August 3, 1962, appear at R. 55–58. The opinion of the court of appeals and its judgment of affirmance were entered on September 7, 1962, and appear, respectively, at R. 116–125 and R. 126.

---

[1] It is the opinion of the Commission that the language and history of Section 15(7) of the Interstate Commerce Act show a congressional purpose to put proposed rates into effect upon the expiration of the statutory suspension period unless the Commission, after hearings, has finally found the rates to be unlawful.

JURISDICTION

The petition for a writ of certiorari was granted on October 15, 1962 (R. 143). The judgment of the court of appeals was entered on September 7, 1962 (R. 126). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The applicable provisions of the Interstate Commerce Act, as amended, are Section 15(7), 49 U.S.C. 15(7); Section 22(1), 49 U.S.C. 22(1); and the National Transportation Policy, preceding 49 U.S.C. 1. The texts of these statutes, together with relevant prior versions of what is now Section 15(7), are set forth in the Appendix, *infra*, pp. 47–52.

QUESTION PRESENTED

Whether a District Court is powerless to prevent extreme and irreparable injury to shippers, port cities, and competing barge lines by temporarily enjoining a railroad from putting rates into effect until the Interstate Commerce Commission can complete an investigation and render a final decision as to their lawfulness in a situation in which the Commission has suspended the proposed rates on the ground that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *," but has been unable to complete its investigation within the suspension period and is without further power to suspend the rates.

STATEMENT

In 1961, the respondent railroads filed with the Interstate Commerce Commission a schedule of drastically reduced rates for the transportation of grain in multiple car shipments from certain Mississippi and Ohio River ports to specified destinations in the Southeast. The proposed rates—which are fixed at three levels, applicable to five, ten, and twenty car shipments, respectively—average less than 40 percent of the rates currently in effect between the same points (R. 36). On complaint by competing barge lines and other parties, the Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * * ", and suspending the effectiveness of the proposed tariffs for the maximum statutory period of seven months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission initiated a proceeding entitled Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South,* and scheduled hearings to begin in October 1961 (R. 56–57).

To compensate for postponement and interruption of the hearings by respondent Southern, the railroads twice agreed to extend the suspension period, first to July 7, 1962, and then to August 7, 1962. Thereafter, however, they refused to comply with requests by petitioners for a further extension (R. 57). Petitioners then filed a complaint in the district court seeking a temporary injunction to maintain the *status quo* and to restrain the railroads from applying the proposed rates to the transportation of grain until the Commission could rule on their lawfulness (R. 4–15). Southern filed an answer (R. 48–52) and a motion to dismiss (R. 47). Supporting affidavits were filed on behalf of petitioners, and counter-affidavits on behalf of Southern. Briefly summarized, the substances of the allegations contained in these affidavits was as follows:

Petitioner Arrow Transportation Company is a common carrier by water, operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 32). It alleges that a major part of its traffic—providing 68 percent of its tonnage and 80 percent of its revenues—consists of the movement of grains to Tennessee River ports, such as Guntersville, Alabama, from which fourfifths of the grain is then reshipped by land carrier to various processing and consuming points in the Southeast (R. 32-33). The currently effective all-rail rates for carrying grain from Mississippi and Ohio River ports (such as St. Louis and Evansville) to destinations in the Southeast (such as Atlanta and Birmingham) are substantially higher than the combined rates for transporting such grain from those ports by barge to the mills and elevators at Guntersville and then reshipping it by rail to the same destinations. However, the proposed multiple car rail rates (which, according to Arrow (R. 41-43) are either below or only slightly above Southern's out-of-pocket costs and uniformly below the out-of-pocket costs of all the other respondent railroads) will be considerably less than the combined barge-rail rates (R. 35-36). The application of these proposed rates, Arrow maintains, will cause it an immediate loss of revenues; and if the rates continue in effect long enough to permit other grain buyers to equip themselves for receiving multiple car shipments, Arrow will be forced to cease its operations on the Tennessee River, surrender its certificate of public convenience and necessity, and liquidate its assets (R. 33-34).

Petitioner, City of Guntersville, Alabama, is a Tennessee River port and the site of a number of grain elevators, grain merchandisers, feed mills and related businesses which depend on inbound barge transportation as the chief means of receiving interstate shipments of grain (R. 6-7). It alleges that its economic welfare is largely dependent on this grain industry; that the proposed multiple car rate will "seriously handicap, if not actually eliminate," the barge transportation of grain to Guntersville; and that unless enjoined, these rates will have a "devastating effect" on the economy of the city (R. 40–41).

Petitioner O. J. Walls (d/b/a O. J. Walls Company, a corporation) is actively engaged in buying and merchandising grain in Guntersville. He alleges that the proposed multiple car rates will drastically reduce the quantities of grain handled through his elevator and, if allowed to remain in effect for more than a few months, will force him out of business. He further represents that 30 percent or more of his sales are to customers at various destinations in the Southeast who are equipped to receive multiple car shipments; that most of these customers have informed him that as soon as the proposed rates go into effect they will immediately abandon purchases of barge-rail grain from him and rely on the cheaper multiple car rates; and that he himself is not equipped to receive multiple car shipments and, even if he were, would still be underpriced because of the high transportation charge beyond Guntersville to the areas of consumption (R. 43–46).

Petitioner John D. Bagwell Farms and Hatchery, Inc. is engaged in the production and sale of broilers (poultry). It is not located on a railroad, and thus is almost exclusively dependent on low-cost barge grain, which it picks up in Guntersville, transports 65 miles to its plant in its own trucks, and there grinds into feed for the broilers. Bagwell alleges that its major competitors, large national concerns, are presently equipped to receive multiple car shipments of grain; that, if the proposed rates go into effect, those concerns will be in a position to exploit the rates immediately and hence substantially undersell Bagwell; and that Bagwell will thus be faced with a choice between suffering serious and immediate competitive disadvantage, or investing approximately $150,000 in rail facilities which will become useless if the Commission later declares the rates unlawful (R. 38–39).

In response to these claims, Southern Railway Company alleges, among other things, that 45 percent of the grain moving to the Tennessee River ports is actually processed there, and that the railroads will be in no position to divert the traffic in such grain from the barges (R. 20-21); that most of the barge traffic in grain originates in areas which Southern Railway does not serve and from which no reduced multiple car rail rates are proposed by any rail carrier; that the proposed multiple car rates from St. Louis and Evansville to Guntersville are higher than the published barge rate between those points; and that Southern is prepared to publish its proposed rates from Chattanooga and is confident that respondent Louisville and Nashville Railroad, in order to meet Southern's competition, will publish its own multiple car rates from Guntersville (R. 17, 19–21). Southern also contends that the railroads must compete with unregulated motor carriers in many areas from which the barges do not operate; that the proposed rates, far from being unprofitable, will in fact provide revenues that are more than 140 percent of costs; and that they have the support of the Southern Governors' Conference, the Southeastern Association of Railroad and Utilities Commissioners, the United States Department of Agriculture, and numerous receivers and processors all over the South (R. 19–22).

Affidavits opposing the requested relief were also filed by a feed mill located in Guntersville (which represented that it and other Guntersville concerns would continue to use barge transportation) (R. 26–27); a flour mill in North Carolina (which indicated that substantial cost savings would be made available to shippers by the proposed multiple car rates) (R. 28–30); and by a spokesman for the Southern Governors' Conference and the Southeastern Railway Association of Railroad and Utility Commissioners (who urged that delay in making reduced rail rates effective was resulting in irreparable damage to Southern producers, processors, and consumers) (R. 30–32).

On August 2, after a hearing in which all parties relied upon the affidavits and pleadings, the district court filed a memorandum opinion (R. 52–55) stating that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time," but disclaiming jurisdiction to grant the requested injunctive relief. A day later, the court entered findings of fact, conclusions of law and an order (R. 55–58), in which it found that "[t]here is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect * * * for which plaintiffs will have no adequate remedy at law," but concluded that the courts are without authority to enjoin the effectiveness of common carrier rates before a final order by the Commission.

Petitioners filed a notice of appeal (R. 61) and obtained a temporary restraining order pending a hearing before the Court of Appeals for the Fifth Circuit (R. 67). On August 8, 1962, the court of appeals denied petitioners' motion for an injunction pending decision on the appeal, but continued the restraining order to give petitioners an opportunity to seek relief from this Court (R. 100). On August 17, 1962, Mr. Justice Black extended the temporary restraining order pending final decision in this Court on the question of the district court's jurisdiction (R. 101–105). On September 7, 1962, the court of appeals entered its opinion (R. 116–125) and judgment (R. 126) affirming the district court but staying issuance of its mandate for 21 days. On September 26, Mr. Justice Black ordered that the status quo be preserved "pending final disposition in this Court of all matters in all the proceedings in this case or cases * * *."

INTRODUCTION AND SUMMARY

Petitioners are asking this Court to provide an extraordinary remedy—extraordinary not only in the sense that an injunction traditionally requires a special showing—but extraordinary also in that its grant might seem at first blush a departure from the statutory scheme which Congress enacted. To say so much is to affirm that petitioners have a heavy burden to sustain. It is to say also that if equitable intervention is to be justified at all in circumstances where the administrative remedy afforded by the Interstate Commerce Act has been exhausted, the availability of a judicial remedy is to be very narrowly circumscribed, that is to say, confined to the case in which there is the most compelling proof of need—proof going far beyond what would normally constitute a sufficient showing of irreparable injury.

For the generality of cases, the statutory scheme seems plain enough. A carrier files new rates, and the Commission, after making a preliminary examination of the carrier's justification for its proposed changes, makes an expert judgment whether they should be suspended, *i.e.,* held in abeyance for a period of no longer than seven months. Thus, the Commission decides, in the first instance whether the rate is to be suspended at all. If it concludes that the rate is *prima facie* lawful, the carrier is free to put it into effect at once. If it concludes otherwise, it may restrain the carrier, *pendente lite,* but not for a period in excess of seven months. Hopefully, the administrative proceedings will be completed during this period. If this expectation is not fulfilled, the carrier may nonetheless begin to collect the questioned charges, subject however, to the duty to make redress if it should fail to prevail on the merits. In this situation—the situation, incidentally, upon which Congress focused its attention when it enacted the provision for suspension of rates—there is plainly no occasion for judicial intervention even though the Commission has not yet determined the lawfulness of the new rates. The district court does not come into the picture until the Commission promulgates its order disposing of the merits of the controversy, at which point, of course, any aggrieved party may seek judicial review.

The arrangement doubtless represented a compromise. The carrier normally desires, for obvious reasons, to put its changed rates into effect as promptly as possible; the rates cannot be collected until they become effective and what is lost during a period of delay cannot be recouped. The shipper (or a competing carrier) who claims that the rates are unlawful and that he will be injured thereby has a directly opposing interest: to forestall the evil day. This is so even though he has a remedy, by way of damages or reparations, in the event that the rates go into effect and are subsequently held unlawful. A remedy later—especially one which may prove imperfect, cf. *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* No. 48, this Term, December 3, 1962—is less appealing than the avoidance of injury now. For seven months the shipper is protected—assuming the Commission finds reason to believe the rates would be unlawful—even though the carrier may suffer injury from the delay in putting into effect what may ultimately prove to be lawful rates. After seven months the burden is put on the shipper and competing carriers. The shipper is required to pay charges that may ultimately turn out to be unlawful. The alternate carrier may suffer from unlawful competition. In both cases substantial irreparable injury may ensue. The shipper may suffer not only higher costs, but a loss of markets scarcely susceptible of proof. The competing carrier may lose unascertainable amounts of traffic. But although this kind of irreparable injury will normally support an application for equitable relief, it is insufficient, in our view, to warrant a judicial injunction suspending the effectiveness of a carrier's proposed rates beyond the seven-month period of administrative suspension authorized by the Interstate Commerce Act. Congress can hardly have failed to perceive that substantial and sometimes irreparable hardship was bound to fall upon one side or the other. The courts should not upset the balance that Congress struck.

The difficult problem arises when there is a showing of truly extraordinary injury such as Congress apparently failed to anticipate. Suppose, as is claimed here, putting the proposed rail rates into effect would probably destroy the petitioner barge line, as well as cause gross discrimination against shippers and localities, before the Commission was able to complete the administrative proceeding and finally determine the legality of the rail rates.[2] Immediately, two points are to be noted. *First,* the Commission, in suspending the rail rates, found that "[t]here is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *" (R. 56–57). *Second*, Congress, in its statement of the National Transportation Policy and elsewhere in the Interstate Commerce Act, has enjoined the Commission to preserve each medium of transportation against unlawful and destructive practices and to guard against the consequences of discrimination.

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[2] We intimate no view as to the correctness of the petitioners' allegations, noting only that they appear to have been accepted in the district court's findings and that they must be assumed correct for the limited purpose of deciding the issue of the district court's jurisdiction.

The issue which emerges can be stated, then, as follows: Can equity act in the extreme circumstances where a failure to intervene would result in forfeiture of the complainants' statutory rights under the Interstate Commerce Act because they are threatened with extinction by virtue of conduct which the Interstate Commerce Commission itself has reason to believe unlawful? Or, stated even more succinctly, must the complainants perish because the administrative process has languished?

As we argue below, it is a traditional and a vital function of equity to grant injunctive relief in aid of a principal action pending in another forum when such intervention is essential in order to preserve the *status quo* and to prevent irreparable injury. This is so whether the principal action is one awaiting adjudication in a court of law or before an administrative agency.

The more difficult question—one certainly not free from doubt—is whether the statutory scheme evinces a purpose to exclude, even in the most extreme circumstances, the possibility of judicial intervention while the case is pending administratively.

In terms, the statute does not answer the question. It places a time limit—seven months, under the presently applicable provision—upon the administrative injunction but does not undertake to state whether the judiciary may thereupon intervene. The grant of limited power to an administrative agency does not necessarily carry with it an implication that all judicial remedies are foreclosed, especially when the grant of injunctive power to the agency is accompanied by a directive which importunes it to complete the case within the prescribed period. It is to be noted additionally that Section 22(1) of the Act undertook to preserve "remedies now existing at common law."

The legislative history, in our view, is inconclusive. For one thing, the principal focus of attention was the conflict between the carriers' position that rate changes should be delayed only for a short period, if at all, and the shippers' position that suspension was a better remedy than damages and should be indefinite in duration. Also, many Congressmen were apparently of the view that the suspension period finally provided by the legislation was adequate to permit completion of the administrative proceedings. One does find, in a few instances, some recognition by individual legislators that this expectation might occasionally fail of fulfillment. Although we think that the statutory seven months' limit upon administrative suspension implies a legislative judgment that there should be no further delay in putting the rates in effect despite such hardship as might ordinarily be expected to result—a judgment the courts are bound to respect—there was no expressed consensus as to whether it would ever be within the power of an equity court to intervene. We discern no disposition on the part of Congress to preclude that possibility. Rather, we find indications that those who thought about it at all were in disagreement as to the state of existing case law on the subject of enjoining rates and were content, by and large, to leave that question to the courts.

Against this background, we reach the conclusion that the statutory scheme does not, in any and all circumstances, preclude equitable intervention. A fair regard for that scheme, however, does lead us to the view that intervention should be very narrowly confined. For example, if petitioners here were claiming merely a threatened loss of profits, we would say that they should be relegated to the remedy of damages provided in the statute even though it might be less than adequate. We suggest that different considerations apply if there is ground for finding that a competing carrier will be destroyed and others will suffer gross discrimination and injury before the administrative proceeding is terminated.

We point out finally that the course we suggest involves no conflict with the primary jurisdiction of the Commission. The finding that there is reason to believe that the rates here in issue would be unlawful was made by the Commission. The district court refrained from re-examining this determination—properly so, we believe, since judicial intervention in the rate-making process, at a preliminary stage, might be disruptive. The court has determined only that there has been an adequate showing that the complainants are threatened with grave and irremediable consequences, and it has ruled only that it would be appropriate (assuming jurisdiction) to preserve the *status quo* until the Commission can make the final determination of legality which is committed to it. In these circumstances, we think that judicial intervention would be in aid of the Commission's jurisdiction and not in derogation of it.

ARGUMENT

THE DISTRICT COURT HAD JURISDICTION TO ENJOIN THE EFFECTIVENESS OF THE RAILROAD'S FILED RATES, PENDING THE COMMISSION'S DETERMINATION OF THEIR VALIDITY, IN ORDER TO PREVENT EXTREME AND IRREPARABLE CHANGES IN THE STATUS QUO AFTER EXPIRATION OF THE STATUTORY SUSPENSION PERIOD

A. GENERAL EQUITY PRINCIPLES SUSTAIN THE POWER OF A FEDERAL DISTRICT COURT TO GRANT ANCILLARY RELIEF PENDING AN ADMINISTRATIVE PROCEEDING

The petitioner in this case invokes an historic office of equity jurisdiction. It has long been recognized that courts of equity have inherent power to grant temporary injunctive relief in aid of, or ancillary to, a principal action in another forum in order to preserve the *status quo* and prevent irreparable injury while the principal action is in progress. This relief was traditionally available whether the main action was pending in a court of law[3] or in an administrative agency. Thus, when government departments were vested with authority to determine title to property, equity courts restrained waste and trespass pending final determination by the agencies.[4]

A line of relatively recent cases involving the Maritime Commission demonstrates that this historic function of equity jurisdiction has lost none of its vitality. In *West India Fruit & Steamship Co.* v. *Seatrain Lines,* 170 F. 2d 775 (C.A. 2), certiorari dismissed, 336 U.S. 908, a common carrier, alleging irreparable injury, sought to enjoin its competitor from putting into effect certain proposed rate reductions pending a decison by the Maritime Commission as to their validity. The Commission itself intervened in the proceeding on behalf of the plaintiff. The Second Circuit, upholding the grant of an injunction, held that the doctrine of primary jurisdiction did not preclude the relief sought because the trial court was being asked "to assist the Commission by preserving the status quo until it could determine * * * how it should act" (170 F. 2d at 779). On the same reasoning, injunctions were granted to maintain the *status quo* pending action by the Maritime Commission in *Isbrandtsen* v. *United States,* 81 F. Supp. 544 (S.D. N.Y.), appeal dismissed, 336 U.S. 941 (despite the fact that the Commission apparently opposed injunctive relief) and *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M.T. Ass'n.,* 183 F. Supp. 910, 916, 917 (E.D. Pa.). An injunction was denied for failure to show irreparable injury in *United States Trucking Corp.* v. *American Export Lines,* 146 F. Supp. 924, 148 F. Supp. 61 (S.D. N.Y.), but the district court evinced no doubt as to its jurisdiction. And recently, when the Court of Appeals for the District of Columbia Circuit held that the Maritime Board had no authority itself to grant an interlocutory stay of a disputed practice before determining its validity, the court set aside the agency's injunction and referred the parties to a proceeding "in a court of equity to seek injunctive relief" *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Board,* 302 F. 2d 875, 880 (C.A. D.C.).[5] See, also,

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[3] *Erhardt* v. *Boaro*, 113 U.S. 537; *Eastern Oregon Land Co.* v. *Willow River Land Irrigation Co.*, 201 Fed. 203, 211-212 (C.A. 9); *Buskirk* v. *King*, 72 Fed. 22 (C.A. 4); see *Louisville & N.R. Co.* v. *Western Union Telegraph Co.*, 207 Fed. 1 (C.A. 6); 2 Story's *Equity Jurisprudence* (14th ed.) §§ 1232–1235, 1238.

[4] *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568 (S.D. Cal.); *Northern Pac. Ry. Co.* v. *Soderberg*, 86 Fed. 49 (N.D. Wash.); cf. *United States* v. *Parrott*, Fed. Cas. No. 15,998, 27 Fed. Cas. 416 (N.D. Cal.). In *Parrott*, the court demonstrated that equity injunctions were not limited to supplementing actions at law, and were also available in aid of administrative proceedings, by citing the historic grant of such remedy to protect property in litigation in ecclesiastical courts. 27 Fed. Cas. at 423, 425. Equity acted when there was danger of destruction of the property in dispute and "'the powers of the court in which the litigation is depending are insufficient for the purpose.'" 27 Fed. Cas. at 425.

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[5] One agency, the National Labor Relations Board, has specific statutory authority to obtain "appropriate temporary relief or restraining order" from district courts while it considers an unfair labor practice complaint, 29 U.S.C. 160(j); it has been noted that such intervention by a court, ancillary to a proceeding pending in another tribunal, "is of ancient

Board of Governors v. *Transamerica Corp.*, 184 F. 2d 311 (C.A. 9), in which an injunction was granted at the behest of the Federal Reserve Board to prevent the threatened ouster of its jurisdiction to consider the validity of a stock acquisition under the Clayton Act. While the Ninth Circuit acted in aid of its prospective appellate jurisdiction, the court, in a subsequent contempt action, relied upon the analogy of equity jurisdiction and of the *West India* case cited above. 184 F. 2d 319, 325.

The instant case plainly falls within the reach of this traditional ancillary jurisdiction. Under the National Transportation Policy, Appendix, *infra*, pp. 48–49, the Interstate Commerce Commission is charged with the duty "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, * * *." Petitioners allege that if respondent's rate reductions are allowed to take effect barge transportation on the Tennessee River, together with those industries which depend on that transportation, will be completely destroyed, and communities, such as Guntersville, which owe their welfare to those industries, will be gravely injured. If, as these allegations envisage, the barge lines are driven out of business be-

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origin" and contains "no novelty," citing the equity jurisdiction which was discussed above. *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind.).

fore the Commission can rule upon the lawfulness of the rates, the Commission will be rendered powerless to grant effective relief or to carry out the declared policy of Congress, and the outcome of a bitterly contested economic controversy in which an important public interest is at stake will be determined not by the responsible agency, applying the statutory criterion, but by the force of circumstances. We think it clear that, unless Congress has provided otherwise, a court of equity has inherent power to protect the barge lines against these disastrous consequences and to prevent the paralysis of the Commission's jurisdiction.[6]

B. THE AVAILABILITY OF ANCILLARY RELIEF IN CASES OF EXTRAORDINARY NEED IS COMPATIBLE WITH THE LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 15(7)

We have shown that the issuance of injunctive relief to prevent irreparable injury pending the conclusion of an administrative proceeding is a recognized function of equity courts, and that, on the allegations made by petitioners, there appear to be compelling reasons for granting the requested relief in this case. In adopting and amending the Interstate Commerce Act, Congress did not explicitly rule out such interlocutory judicial intervention. The question is whether such an ouster is to be inferred from the fact that Section 15(7) of the Act empowered the Commission to suspend proposed rates for a limited period of seven months.

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[6] The statutory jurisdiction of a one-judge district court to adjudicate a cause such as this rests upon 28 U.S.C. Section 1337, which confers on the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." Jurisdiction here is also based on 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1332 (diversity of citizenship). We would not exclude the possibility, however, that this action might also have been heard by a three-judge district court (which, by virtue of 28 U.S.C. Section 2325, has sole power to review orders of the Commission) under the "all writs" section, 28 U.S.C. Section 1651, in order to protect its own jurisdiction to review the ultimate Commission order with respect to the proposed rates. Cf. *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C.A. 9).

In approaching this question, the standard to be applied is the one recently enunciated by this Court in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, No. 37, this Term, decided November 19, 1962, when it considered whether a common law action could be brought for unreasonable charges due to misrouting, despite the absence of any basis therefor in the Motor Carrier Act. A judicial remedy may coexist with a comprehensive regulatory scheme, it was held, when "the exercise of the judicial remedy supports [the Act's] overall purposes and is in nowise inconsistent with the congressional scheme embodied within its four corners" (Slip Op., p. 6). While the question is not without difficulty, we believe that, in the circumstances of this case, the exercise of equity jurisdiction is not inconsistent with, but indeed supports, the congressional scheme for regulation of carriers.

Section 15(7) of the Act, 49 U.S.C. 15(7), Appendix, *infra*, pp. 47–48, provides (a) that the Commission may suspend the operation of a proposed rate for a period of up to seven months pending a hearing and decision as to the lawfulness of that rate; (b) that if the proceeding has not been concluded by the end of the suspension period, the rate shall go into effect; but (c) that the Commission may require the interested carrier to keep an accurate account of the amounts collected under the proposed rate and, upon completion of the hearing, to make refund of that portion found to be unjustified. In our view, neither the language nor the legislative history of this provision requires the conclusion that, in limiting to seven months the period for which the *Commission* could hold a rate in abeyance, Congress also meant to preclude all possibility of judicial relief after the suspension period had expired. True, the section does provide that at the end of that period "the rate shall go into effect." But this clause can fairly be interpreted as merely laying the foundation for the immediately following provision, contained in the same sentence, that the Commission may require accurate accounts and refunds of overcharges. Viewed in this light, the "going into effect" language is simply part of a comprehensive description of the administrative machinery set in motion when a proposed rate is filed, but is not conclusive of the question of judicial power. Note also, in this connection, the express declaration in Section 22(1) (49 U.S.C. 22(1)), Appendix, *infra*, p. 48, that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law * * *."

The legislative history of 15(7), we think, bears out the conclusion that Congress was concerned with the administrative treatment of proposed rates during the interim period prior to the ultimate Commission decision, and that it did not address itself to the question whether, in circumstances such as those presented here, traditional equity relief would be available to protect complainants from extreme and irreparable injury. This is not, of course, to say that policy considerations manifest in the administrative scheme are to be disregarded by the courts.

1. *The legislative history and case law prior to 1910*

Prior to 1910 the Commission was without power to postpone the effectiveness of a proposed rate pending an investigation of its lawfulness. Indeed, it was inherent in the statutory scheme that the Commission could take no action at all with respect to a rate until it had already gone into effect. Although the Hepburn Act of 1906, 34 Stat. 584, 589, had clothed the Commission with authority to prescribe maximum rates for the future—rather than merely to condemn existing carrier-made charges and award reparations—this authority could be exercised only upon complaint,[7] and upon a finding that the rate currently "demanded, charged, or collected" by the carrier was unreasonable, 34 Stat. 589; Appendix, *infra*, pp. 49–50. On its face, therefore, the legislative scheme appeared to offer no opportunity for the exercise of ancillary jurisdiction by an equity court. For if a carrier were enjoined from putting a proposed rate into effect, the Commission would never be in a position to pass upon it; its jurisdiction would be ousted, rather than aided, by the court.[8] Moreover, since the Act did not then require the Commission to make a finding of *prima facie* unlawfulness—such as it now makes when it suspends a rate—the court, under traditional equity standards, would have been forced to conduct its own independent inquiry into the reasonableness of the rate, and, in so doing, to enter an area entrusted to the Commission.

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[7] It was generally assumed that the complaint could be filed only after the rate had become effective, although the statute (24 Stat. 383–384) did not expressly so provide. See I. Sharfman, *The Interstate Commerce Commission*, p. 50 (1931); 45 Cong. Rec. 2819, 3466, 4711, 5143. In its *Annual Report*, 1908, pp. 11–12, the Commission stated that "complaint cannot be filed with this Commission against a rate which is not in effect, or at least has not been duly published * * *." In some instances, the Commission acted upon complaints relating to rates which, though filed and published, were enjoined from being collected. See fn. 8, *infra*.

In light of these formidable impediments, it is not surprising that judicial opinion in the lower federal courts, though confused and divided, tended preponderantly to the view that equity had no power to restrain a carrier from giving effect to a proposed rate upon which the Commission had not yet acted. Some courts maintained that equity did have jurisdiction to enjoin the collection of a proposed rate pending a Commission decision, apparently believing that if the rate had been filed and published, the injunction would not impair the Commission's ability to pass upon it.[9] Some even believed it would lie within the power of equity to grant a permanent injunction.[10] The weight of authority, however, was to the contrary. In two instances it was expressly recognized that an injunction could not be merely "ancillary," since its issuance would have the effect of preventing further action by the Commission. *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.,* 171 Fed. 723, 724–726 (W.D. Va.), affirmed per curiam, 178 Fed. 266 (C.A. 4); *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. Ry. Co.,* 156 Fed. 160, 167–168 (D.S.D.) (stating, however, that the court *would* have power to grant a *permanent* injunction, since Congress had given the Commission no authority to deal with a rate which had not gone into effect). Most of the decisions denying the availability of equitable relief,[11] however, rested upon broader grounds. They held that the Interstate Commerce Act affirmatively secured to carriers the right to fix rates in the first instance, free of any governmental interference and subject only to liability for reparations if the Commission later found the rates unlawful. In addition, they discerned in this Court's decision in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, a broad rule foreclosing any type of judicial intervention in the ratemaking process prior to the exercise by the Commission of its primary jurisdiction to pass upon the reasonableness of the rates.[12]

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[8] See *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.*, 171 Fed. 723, 724–726 (C.C. W.D. Va.), affirmed *per curiam*, 178 Fed. 266 (C.A. 4); *Jewett Bros. & Jewett* v. *Chicago M. & St. P. Ry. Co.*, 156 Fed. 160, 167, 168 (D.S.D.). It appears, however, that despite the statutory requirement that the rate considered by the Commission be one currently "demanded, charged, or collected," the Commission was prepared to pass upon a rate which the carrier had filed and published but which a court had enjoined it from collecting. See the Commission's *Annual Report*, 1908, pp. 11–12, describing *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 Fed. 193 (N.D. Ga.).

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[9] *Northern Pac. Ry. Co.* v. *Pacific Coast Lumber Mfrs.' Ass'n,* 165 Fed. 1 (C.A. 9); *Union Pac. Ry. Co.* v. *Oregon & Wash. Lumber Mfrs. Ass'n,* 165 Fed 13 (C.A. 9); *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.,* 158 Fed. 193 (N.D. Ga.).

[10] *Jewett Bros. & Jewett* v. *Chicago M. & St. P. Ry. Co.,* 156 Fed. 160, 166–167 (D.S.D.) (dictum); *Tift* v. *Southern Ry. Co.,* 123 Fed. 789 (S.D. Ga.), affirmed on other grounds, 206 U.S. 428 (1907).

[11] *Columbia Iron & Steel Co.* v. *Kanawha & M. Ry. Co.,* 178 Fed. 261 (C.A. 4); *Wickwire Steel Co.* v. *New York Cent. & H. R. Co.,* 181 Fed. 316 (C.A. 2); *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.,* 166 Fed. 206 (C.A. 5).

We submit that these early lower court cases, though possibly correct in result, should be given little weight here. For, as we have shown, they were decided under a statutory scheme which, in terms at least, made it impossible for a court of equity to stay the effectiveness of a rate except by drastically interfering with the primary jurisdiction of the Commission.[13]

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[12] In the *Abilene* case, this Court held that a shipper could not maintain a common law action to recover damages for excessive interstate freight charges in advance of a decision by the Commission that the rates were unlawful. However, in *Southern Railway Co.* v. *Tift*, 206 U.S. 428, which was also decided prior to the 1910 amendment of the Interstate Commerce Act, the Court made the following comment, by way of dictum, as to the power of a trial court to issue a temporary injunction prior to a Commission decision (p. 437):

> In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in *Texas & Pacific Railroad Company* v. *Abilene Cotton Oil Company*, 204 U.S. 426, upon a different record than that before us. *We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates.* The Circuit Court granted no relief prejudicial to appellants on the original bill. * * * [Emphasis added.]

The primary jurisdiction theme sounded in *Abilene* was reiterated in *Baltimore & Ohio Railroad Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U.S. 481, which was also relied upon in the Second and Fourth Circuit cases cited in fn. 6, *supra*.

2. The Mann-Elkins Act of 1910

The suspension power was added to the statutory scheme by Section 12 of the Mann-Elkins Act of 1910 (36 Stat. 539, 552), Appendix, *infra*, pp. 49–50. That provision authorized the Commission (a) to initiate an investigation immediately after the filing of a proposed rate (instead of waiting for a complaint after the rate had already become effective); (b) by an order stating its reasons, to postpone the effective date of the rate for a maximum period of 120 days; and (c) if it had not been able to complete its investigation by then, to continue the suspension for an additional period not to exceed six months. The effect of this measure—we do not say its purpose—was to remove the impediments to the exercise of ancillary equity jurisdiction which had been inherent in the previous statutory scheme. For it was now possible for a court to issue an interlocutory injunction without making a preliminary finding as to reasonableness of the rate (the Commission already having done this) and without placing in doubt the Commission's own power to pass upon the rate.

There was very little opposition to the basic proposal that the Commission be given some degree of authority to hold rates in suspense, for it was generally recognized that the reparations remedy did not adequately protect shippers against excessive freight charges. S. Rep. 355, 61st Cong., 2d Sess., pp. 8–9. See 45 Cong. Rec. 2819. The chief subject of controversy was whether the suspension should be limited to a fixed period, after which the rate would take effect even if the Commission had not yet completed its investigation, or whether it should be indefinite in duration, continuing until the Commission had rendered its decision, however much time that might require. Senator Cummins (a member of the Committee on Interstate and Foreign Commerce), the principal advocate of indefinite suspension, introduced an amendment to delete from the original bill (as amended) a provision limiting the suspension period to a maximum of 120 days and to provide, instead, that no increased rate should go into effect until the Commission had found it just and reasonable.[14] A similar amendment was proposed in the House by Representative Madden. 45 Cong. Rec. 5843. In support of his amendment, Senator Cummins argued that a limited suspension period would invite the railroads to inundate the Commission with rate increases, and, by means of this and other dilatory tactics, prevent the Commission from passing on the rates until long after they had gone into effect. 45

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[13] As we point out *infra*, pp. 40–43, there is no threat of interference with primary jurisdiction in the situation presented by the case at bar.

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[14] 45 Cong. Rec. 6499. As originally reported, Section 9 of the bill authorized the Commission to suspend the operation of a rate for a period not to exceed 60 days. S. 6737, Section 9, 61st Cong., 2d Sess.; 45 Cong. Rec. 2819. At the outset of the floor debate on this provision, an amendment by Senator Aldrich doubled the 60-day period to 120 days. 45 Cong. Rec. 6464.

Cong. Rec. 6502, 6500, 6781. He further urged that the burden of administrative delay should be borne by the railroads, rather than the shippers, since the carriers were better able to afford it, 45 Cong. Rec. 6510–6511. The proponents of limited suspension maintained that the period would, in the generality of cases, be enough to enable the Commission to render its decision; that, unless the Commission were under some pressure to act dilligently, it might abuse the suspension power by allowing proceedings to be prolonged indefinitely; and that to suspend a rate indefinitely would raise serious constitutional problems. *E.g.* 45 Cong. Rec. 2819, 3472, 5847–5849, 6784, 6917. The most significant objection to the Cummins amendment, however, was probably the one raised by Senator Jones, who pointed out that whereas a shipper could recover reparations if a rate permitted to go into effect were later found excessive, the railroad had no remedy to recoup its lost revenues if a suspended rate ultimately proved lawful. 45 Cong. Rec. 6782, 6783. Both the Cummins amendment in the Senate and the Madden amendment in the House were defeated. 45 Cong. Rec. 6915, 5850. An amendment offered by Senator Jones, extending the 120-day suspension for an additional six months, was adopted by the Senate, 45 Cong. Rec. 6921, and after conference by the House. H. Rep. No. 1588, 61st Cong., 2d Sess.; 45 Cong. Rec. 8134, 8142. It was thought that this period would allow the Commission ample opportunity to complete its hearings, yet at the same time not be unduly burdensome to the railroads. 45 Cong. Rec. 6917.

During the course of the debates there was very little discussion as to whether a shipper threatened with extreme and irreparable injury by a new rate might—either under prior law or under the proposed new legislation—obtain injunctive relief in an equity court pending the Commission's decision. In the House debates, three comments are pertinent. Representative Mann (Chairman of the House Committee on Interstate and Foreign Commerce and author of the House bill) observed that "under existing law there is no method by which you can prevent the proposed new rate continuing in force while the commission is investigating the subject as to whether the rate ought to remain in force." 45 Cong. Rec. 4711. It is not clear, however, whether Representative Mann was referring merely to the absence of any administrative suspension power in the regulatory scheme itself, or whether he meant that there was no judicial remedy either.[15] Representative Needham clearly stated that a judicial remedy was available under prior law (45 Cong. Rec. 5847):

> * * * The remedy which the shipper now has is both to go into court and enjoin such contemplated action by the railroad company, and thereafter bring his action before the Interstate Commerce Commission.
>
> * * * It seems a useless and unnecessary

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[15] The same ambiguity clouds several statements in the debates that, at the end of the suspension period, the rates "go into effect." *E.g.*, 45 Cong. Rec. 3472, 6500; 6916–17. Similar language is now expressly set forth in Section 15(7). As indicated *supra*, p. 22, we interpret that language to mean that the rates go into effect so far *as the administrative process is concerned.*

> expense to compel a shipper to go into court and enjoin the railroad company whenever he desires to prevent the inauguration of a new rate, classification, regulation, or practice, and it seems but reasonable to clothe the Interstate Commerce Commission with the power in the first instance to suspend such action on the part of the carrier until the justness or reasonableness of the contemplated action may be heard and determined.

The opposite view was expressed by Representative Cole, who declared (45 Cong. Rec. App. 88):

> * * * This exercise of discretion [by the Commission] is wisely proposed, since courts are without authority to suspend a rate pending the determination of the reasonableness of the rate by the Commission. See Abilene Cotton Oil Company *v.* T. & P. Ry. Co. (204 U.S., 426), in which it was held that the commission alone has power to entertain original proceedings for the alteration of an established schedule.

The debates on the Cummins amendment produced a pertinent exchange between Senator Cummins and Senator Heyburn, an advocate of limited suspension. 45 Cong. Rec. 6777. Responding to Senator Cummins' suggestion that the railroads might adopt tactics that would prolong administrative proceedings beyond a limited suspension period, Senator Heyburn inquired whether "at the stage of the proceedings just pictured by the Senator, where the railroads would bring in such a vast mass of material as to make it impossible for the decision to be rendered within the limit, the parties might not go into a court of equity, and, setting forth those facts, ask that the rates be not put in force because of the wrongful act of the railroad company." Senator Cummins replied that he had "very grave doubt about the right of any shipper to institute a suit of that kind," but that even if there were one, "I for one am not by my vote going to put any such burden upon the shippers of the country." Later in the debates Senator Heyburn clearly indicated his understanding that equitable relief had been available in the circut courts and would, under the proposed bill, be available in the newly created Commerce Court.[16]

Finally, there were fleeting references to the subject of equity jurisdiction in connection with an amendment, proposed by Senator LaFollette, which would have given the newly created Commerce Court [17] jurisdiction over:

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[16] Senator Heyburn's remarks were as follows (45 Cong. Rec. 6793–6794):

> Under the provisions of the bill the court is invested with jurisdiction to hear and determine an application for an injunction at any time; you do not need to wait four months [the suspension period] at all. If an injustice is being done to a citizen of this country for which there is no adequate legal remedy, he may always go into a court of equity and ask for relief. * * * The courts of equity in this country have never failed to administer justice in those cases where there was no convenient or adequate remedy at law.
>
> * * * *Under the statute, should the bill be enacted into law, the shipper may still go into the court, the United States circuit court now, the court created by the bill then.* As he presented his facts in the shape of a bill or petition the court would investigate; and if he alleged that he was wronged by reason of the impossibility of getting action in the courts of law, the court of equity would say, "We will see that you are not destroyed before the law," and reach out its hand and rescue him. [Emphasis added.]

> * * * All suits brought by any shipper or other interested person to suspend or enjoin any rate or rates, or advance in rates filed by any common carrier with the Interstate Commerce Commission, pending a final determination by said commission as to the reasonableness of such rate or rates in a then pending proceeding before said commission, where it shall be made to appear to such commerce court that the enforcement of such rate or rates will result in a deprivation of the complainant's property without due process of law, or without compensation in violation of the fifth amendment to the Constitution of the United States; or wherein it may be made to appear that the enforcement of such rate or rates will result in irreparable injury to the complainant, and that the said Interstate Commerce Commission has not suspended, or has not the power to suspend the enforcement of such rate or rates before the final determination as to the reasonableness of such rates in such pending proceeding before said commission [45 Cong. Rec. 7260].

This amendment, which was defeated, would thus have conferred upon the Commerce Court the power at

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[17] The Commerce Court was a specialized tribunal of five judges, which Congress established by the Mann-Elkins Act, 36 Stat. 539–544, and to which it transferred most of the power to review decisions of the Interstate Commerce Commission which had previously been exercised by the circuit courts. The Commerce Court was abolished in 1914 by the Urgent Deficiencies Act, 38 Stat. 219, and its powers of review placed in the hands of three-judge district courts.

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issue here, to preserve the *status quo* after the exhaustion of the Commission's suspension power. But it would also have gone far beyond this limited judicial intervention. Senator LaFollette frankly acknowledged that his intention was to give shippers and members of the public the right to resort to the Commerce Court at any time, even when the Commission had declined to suspend, and the right to litigate in that forum the very issue of unreasonableness simultaneously pending before the Commission (45 Cong. Rec. 7260–7261). The LaFollette amendment was assailed by Senator Sutherland on the grounds that it would usurp the Commission's primary jurisdiction and that the administrative remedies provided by the Commission were adequate (45 Cong. Rec. 7261). In that connection he intimated that the administrative remedy was exclusive: "But pending the determination of the Interstate Commerce Commission, which is constituted for this precise purpose, I see no reason whatever for extending to the shipper the right to go to court" (45 Cong. Rec. 7261). Senator Burton, on the other hand, objected to the amendment because there was already "ample opportunity" for the shipper to obtain relief "both before the Interstate Commerce Commission and the general courts of the country" (45 Cong. Rec. 7262). And Senator Elkins, Chairman of the Committee on Interstate and Foreign Commerce and author of the Senate bill, pointed both to the statutory remedies and to the availability of equity relief. He stated (45 Cong. Rec. 7263):

> If anyone deprives a citizen or any common carrier or anybody else of property without due process of law or without compensation, in violation of the fifth amendment, the aggrieved party has a right to go into any of the courts of the United States and seek relief. The same is true in the case of any irreparable injury. Anyone can go into a court in a case where irreparable injury is about to be perpetrated and get an injunction.

This legislative history, we submit, affords no basis for the conclusion that Congress "intended" to foreclose a judicial remedy. Rather, it suggests that, in fashioning an administrative suspension procedure, Congress failed to resolve the question of the effect that this innovation might have upon the role of the courts. There was no consensus, and only peripheral comment, as to the power of equity to postpone the operation of a rate, either under prior law or under the contemplated new legislation. Certainly, however, Congress showed no disposition to oust equity jurisdiction from the field if, under traditional principles, it would attach.

Nor did the rejection of the Cummins Amendment and the adoption, instead, of an administrative suspension period limited to ten months, imply any purpose to shield the proposed rate from all possibility of judicial restraint. It is one thing to provide that rates should not be held in abeyance indefinitely by the summary and unreviewable action of an administrative agency, taken upon its own initiative and without any compelling showing of need by the party opposing the rate. It is quite another to erect an absolute barrier to the power of an equity court, in extreme circumstances, to protect a petitioner from the possibly disastrous consequences of an unlawful rate. The fact that Congress rejected a proposal which contemplated the Commission's automatic suspension of every rate increase for an indefinite period does not mean that it wished to disable the courts from intervening, however exigent the circumstances.

As we read the history, Congress attached significance, on the one hand, to the inability of carriers to recover revenues lost during a period of suspension. It also recognized, on the other, the ordinary hardships which a shipper might suffer if compelled, during an interim period, to pay unjust rates. Discrimination or increased costs might mean a loss of business, and reparations might prove a slow and an incomplete remedy. By placing a limit upon the period of suspension, Congress adopted a compromise. The initial burden would fall upon the carriers who, it was thought, were best able to bear it. After a prescribed period (if the administrative proceedings had not yet been completed), the burden would shift. But we find no intimation that the carriers were to be free to shift a burden of such proportions that it would sink those who attempted to sustain it and destroy them before their statutory rights could be determined. We conclude, therefore, that the policy implicit in the statutory compromise calls for judicial abstention in the ordinary situation, but not in the case where the gravity and magnitude of the threat are of such proportions as to demand intervention.

3. Subsequent amendments of section 15(7)

Little further light is cast on the instant problem by subsequent amendments to the suspension provision.[18]

In the Esch-Cummins Act of 1920, Congress amended Section 15(7) by reducing the second suspension period (which the Commission could invoke if it had not completed its hearing within the initial 120-day period) from six months to 30 days. Congress also authorized the Commission (i) to direct carriers to keep accurate account of receipts attributable to rate increases which go into effect at the end of the suspension period and (ii) at the conclusion of the hearing, to order refunds to the extent the rate was found unjustified. Appendix, *infra,* p. 50. See H. Rep. 650, 66th Cong., 2d Sess., p. 66.[19]

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[18] Of passing interest only are two measures enacted by Congress during the first World War period. In 1916 the President assumed control of the railroads as a wartime measure (39 Stat. 645). Since Congress did not authorize the President to initiate rates until 1918, it sought to forestall any large number of rate increases by providing in 1917 that until January 1, 1920, "no increased rate * * * shall be filed except after approval thereof has been secured from the commission." (40 Stat. 270, 272). This provision grew out of a broader proposal that was introduced in the Senate to provide that the commission should suspend all rate increases for the duration of the hearing thereon and that rates should "take effect only after the Commission has found and declared the same to be just and reasonable." This amendment was defeated in the House (55 Cong. Rec. 4385–86), but upon insistence of the Senate, a compromise was agreed to which limited the provision to apply only to January 1, 1920 (see 55 Cong. Rec. 5810). The Federal Control Act of 1918 authorized the President to initiate rates by filing them with the Interstate Commerce Commission. The rates were to take effect at the time directed by the President, and the Commission had no power to suspend them before a final determination (40 Stat. 456).

With regard to the suspension period, Senator Cummins stated on the Senate floor that "the only change that is of importance at the moment is in the length of time that the commission may suspend rates which are filed by the carrier." 59 Cong. Rec. 143. He explained that since Congress had relieved the Commission of many of its duties by establishment of the Transportation Board, the Commission should be able to pass upon rates within the shorter time (*ibid.*).

There was, to be sure, further discussion of the competing considerations. In the House hearings, ICC Commissioner Clarke urged reduction of the suspension period because the railroads were forced to stand an unreasonable loss if the rates were finally found just and reasonable, while the shippers could obtain reparations if they were not. The combination of a shorter suspension and the new refund arrangement, he said, would protect carriers against "unreasonable delay" and protect shippers by assuring and simplifying the recovery of reparations. Hearings on H. 4378 Before the House Committee on Foreign and Interstate Commerce, 66th Cong., 1st Sess., vol. 1, pp. 30–31. See also the discussion of the bill by Representative Esch in similar terms, 58 Cong. Rec. 8317. For an opposing view, see Hearings, vol. 2, pp. 1626–

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[19] As amended in 1927, and as presently in effect, the relevant language of Section 15(7) reads as follows:

> If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; * * *.

1627, where a witness representing an association of federal and state regulatory bodies urged that the shipper was not adequately protected by reparations and that a longer suspension was needed.

The 1920 Act also added to Section 15(7) the language providing that, at the end of the suspension period, "the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect * * *." Appendix, *infra*, p. 51. The legislative history contains no intimation that these words added anything to the law as it then existed. Congress understood, when it passed the Mann-Elkins Act in 1910, that the rates would go into effect at the expiration of the suspension period without the need for further filing or order. *E.g.*, 45 Cong. Rec. 6916–6917. The quoted clause was evidently inserted in 1920 in order to introduce the provision immediately following—that granting the Commission authority to place a condition upon the collection of increased rates which go into effect upon the expiration of suspension.

In 1927, Section 15(7) was modified to provide for only a single suspension period, which was enlarged to seven months. 44 Stat. 1448. This enlargement was proposed by the Commission, which had found itself unable to complete some proceedings within the previously allotted time. S. Rep. 1508, 69th Cong., 2d Sess., p. 4; H. Rep. 1214, 69th Cong., 1st Sess., p. 4. As petitioners note (Brief, p. 22), the fortuitous result of the 1927 revision, which is still in effect, was to make more conspicuous the statement that the rates "shall go into effect" at the end of the suspension period.[19] Again, no inference relevant to the present issue can be drawn from this change.

C. THE GRANTING OF AN INTERLOCUTORY INJUNCTION WOULD NOT CONFLICT WITH PRINCIPLES OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction, contrary to the dictum of the court below, poses no obstacle to the exercise of the equity power invoked here.[20] The

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[20] In *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U.S. 412, decided in 1930, this Court observed (at pp. 429–430) that—

> When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, Sec. 15(7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. There is no similar provision for the suspension of intrastate rates established by state authority.

That portion of the above quotation which is descriptive of the case law prior to 1910 is, for reasons we have suggested *supra*, pp. 23–24, 27, inapplicable to the statutory scheme of today. Insofar as the Court might have been intimating, however, that judicial intervention was impermissible even after 1910, we purpose of that doctrine is to remove from initial consideration by the courts those issues which "under a regulatory scheme, have been placed within the special competence of an administrative body * * *." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. In the present case, the pertinent issues within the Commission's authority were (i) whether to suspend the proposed rates in the first instance and (ii) whether the rates are lawful. It is plain that in granting the requested injunction the court would in no way interfere with the administrative resolution of either of these questions. For the Commission has already exhausted its statutory power to suspend.[21]

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think this dictum must be read in the light of the particular issue involved in *Great Northern*. There, the Court reversed the grant of an interlocutory injunction against certain intrastate rates which had been prescribed by a state regulatory agency and which the railroads were challenging before the Commission as unjustly discriminatory against interstate commerce. If the Commission so found, it had authority to set the rates aside, but it had no interlocutory power to suspend intrastate rates under 15(7) (281 U.S. at 429-430). The railroads' contention that an equity injunction should be granted in aid of the Commission proceedings was rejected on the ground that such an order would interfere with the State's undoubted regulatory authority, which could be overriden only in the manner provided by Congress—*i.e.*, after the Commission had found unjust discrimination against interstate commerce (281 U.S. at 426-428, 430). The instant case presents no such conflict between federal and state, or between judicial and administrative, authority.

[21] We would not urge that a court may enjoin a rate where the Commission has elected not to suspend it. The district courts have held themselves without power to entertain an action for a judicial stay in lieu of the Commission suspension, when the Commission refused to suspend. *Algoma Coal &*

And it will retain full and exclusive authority to decide the ultimate merits, *i.e.*, the lawfulness of the proposed rates, if an interlocutory injunction is issued.

We point out further that the factors which the court must weigh in deciding whether to issue an injunction are discrete from those the Commission considers in deciding whether to suspend, or, ultimately, whether to approve a rate. The nature of the supporting findings which the Commission makes when it suspends a rate is illustrated by the statement it made here: "There is reason to believe that [the rates] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and con-

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Coke Co. v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486 (N.D. Ala.). Review by a three-judge court of a Commission decision to grant or deny suspension has also been denied, either on ground of lack of jurisdiction (*Luckenbach Steamship Co.* v. *United States*, 179 F. Supp. 605 (D. Del.); *Carlsen* v. *United States*, 107 F. Supp. 398 (S.D. N.Y.)) or because the matter is committed to agency discretion (*Consolidated Truck Service, Inc.* v. *United States*, 193 F. Supp. 773 (D. N.J.); *Merchant Truckmen's Bureau of New York* v. *United States*, 16 F. Supp. 998 (S.D. N.Y.)). Other courts have indicated that jurisdiction would exist to correct action plainly contrary to the statute (*Long Island Railroad Co.* v. *United States*, 193 F. Supp. 795 (E.D. N.Y.); cf. *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63 (N.D. Ohio); *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y.)). Under another regulatory statute, one court has reviewed and corrected a Federal Power Commission suspension order on ground of an abuse of discretion in fixing the date from which the suspension ran. *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C.A. 4).

stitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *." These preliminary findings, we submit, make it unnecessary for the equity court to undertake its own independent inquiry into the likelihood that petitioner will succeed on the merits—an inquiry which might encroach upon the agency's primary jurisdiction. The court, we suggest, would be confined to the traditional task of balancing the equities—an evaluation to be undertaken, of course, in the light of the relevant statutory policies. The determination of the court would neither duplicate nor anticipate any decision of the Commission.

If anything, the doctrine of primary jurisdiction underscores the importance of the ancillary and protective relief sought here. At common law, the carrier's freedom to set rates was held in check by the power of equity to enjoin discriminatory practices and restraints of trade and by the power of a court of law to exact damages. The passage of the Interstate Commerce Act and the doctrine of primary jurisdiction have withdrawn from judicial scrutiny many traditional aspects of common carrier liability. Moreover, in order to maintain "the unity of the system of regulation" Congress excluded from the scope of private injunction suits under the antitrust laws "a wrong within the jurisdiction of the Interstate Commerce Commission." *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, 513. Section 16 of the Clayton Act, 15 U.S.C. 26. With injured parties now so largely dependent upon the remedies afforded by the Commission, it becomes increasingly important that the Act be effectively administered and that equity have power to protect the agency's jurisdiction by preventing irreversible changes in the *status quo* pending Commission decision. Cf. *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2), certiorari dismissed, 336 U.S. 908.

CONCLUSION

We have attempted to demonstrate that the statutory scheme does not in all circumstances preclude the availability of injunctive relief *pendente lite*. As we have further indicated, however, such judicial intervention should be confined to situations in which the threatened injury is of extraordinary magnitude. In the "garden variety" case in which a shipper seeks merely to be relieved of the burden of excessive freight charges during the interim period, it is fair to conclude that there should be no deviation from the statutory compromise implicit in Section 15(7) and in its history. The shipper should be relegated to reparations or damages, even though, under normal equity principles, that remedy might be deemed "inadequate." In a case where a rate is challenged as discriminatory or destructively competitive, there may be reason to apprehend somewhat greater injury. Even there, however, the shipper or competing carrier should be required to show that the potential consequences are more drastic than a temporary loss of profits or diversion of traffic. We suggest that, in light of the congressional policy, nothing less than a showing of impending destruction of the complainant will suffice to warrant the intervention of equity.

Nor is it our position that, if jurisdiction be established, the petitioners' right to equitable relief is a foregone conclusion. Important equities freight the other side of the balance as well. First, of course, there is the unrecoverable loss of revenues to the railroads, a factor which will be present in every case in which the court is asked to enjoin proposed rates from taking effect. In addition, however, it is urged by Statesville Flour Mills, in its brief *amicus curiae*, that it and other shippers similarly situated have made large purchases of grain in anticipation of using the proposed multiple car rates, and that the continuing postponement of the rates has subjected those businesses to paralyzing uncertainties and deprived them irreparably of the benefits of the reduced transportation charges. (See also R. 28–30.) The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners contend that to stay the effectiveness of the low multiple car rates would damage large numbers of producers, processors, and consumers in the South (R. 30–32). And the railroads have introduced affidavits contesting petitioners' claim that the multiple car rates will destroy barge traffic on the Tennessee River. *Supra,* pp. 7–8. If the case is remanded, it will be the task of the district court to balance these competing interests and to appraise the magnitude of the threatened injury in light of the exacting standard which we think must govern the availability of injunctive relief in these cases. Relief, if granted, might be accompanied by appropriate conditions, such as the posting of a suitable bond. Obviously, this Court, at this stage, cannot anticipate the outcome of the lower courts' appraisal. We suggest only that petitioners' compelling showing of potential injury is a sufficient basis upon which to invoke the aid of an equity court and that they are entitled to the exercise of the district court's discretion in further proceedings.

Accordingly, we respectfully submit that the judgment of the court of appeals should be reversed and the case remanded to the district court for further consideration under appropriate standards to be enunciated by this Court.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RALPH S. SPRITZER,
FRANK I. GOODMAN,
Assistants to the Solicitor General.

LIONEL KESTENBAUM,
I. DANIEL STEWART, Jr.,
Attorneys.

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APPENDIX

The relevant current provisions of the Interstate Commerce Act, 24 Stat. 379, 384, as amended, are as follows:

Sec. 15(7), 49 U.S.C. 15(7):

> Whenever there shall be filed with the Commission any schedule * * * the Commission shall have, and it is given, authority, * * * to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts

received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

Sec. 22(1), 49 U.S.C. 22(1):

> * * * and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; * * *

National Transportation Policy, note preceding 49 U.S.C. 1:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced

with a view to carrying out the above declaration of policy.

Relevant prior versions of what is now Section 15 (7) of the Interstate Commerce Act are as follows:

Hepburn Act (1906), 34 Stat. 589, Sec. 4 amending Sec. 15:

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. * * *

Mann-Elkins Act (1910), 36 Stat. 552, Sec. 12 amending Sec. 15:

* * * * * * *

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided,* That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. * * *

Esch-Cummins Act (1920), 41 Stat. 486–87, Sec. 418 amending Sec. 15(7):

* * * * * * *

> * * * and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. * * *

Mayfield-Newton Act (1927), 44 Stat. 1447–48, Sec. 2 amending Sec. 15(7):

* * * * * * *

* * * and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

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No. 430

IN THE

Supreme Court of the United States

October Term, 1962

Arrow Transportation Company, a corporation,
O. J. Walls, d/b/a O. J. Walls Company,
John D. Bagwell Farms and Hatchery, Inc.,
a corporation,
City of Guntersville, Alabama,
Petitioners,

v.

Southern Railway Company, a corporation,
Louisville & Nashville Railroad Company,
a corporation,
St. Louis-San Francisco Railway Company,
a corporation,
Seaboard Air Line Railroad Company, a corporation,
Respondents.

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY

Dean Acheson
701 Union Trust Bldg.
Washington 5, D.C.

Francis M. Shea
734 15th Street, N. W.
Washington 5, D.C.

Attorneys for Respondent
Southern Railway Company

December 28, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners,
v.
SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents.

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual

or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision

> shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 8 of the same Act, 49 U.S.C. § 8, reads:

> "That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

QUESTION PRESENTED

Whether the Interstate Commerce Act means what it says in providing that a rate filed by a carrier and thereafter suspended by the Commission "shall go into effect" at the end of the statutory suspension period, even if the Commission has not concluded its hearings; or whether, on the other hand, a United States district judge has jurisdiction and authority to do what the Commission is not permitted to do, namely, restrain the carrier from putting the rate into effect after the end of the statutory suspension even though, if the rate goes into effect and is subsequently held illegal, persons injured thereby have a statutory remedy for damages, whereas if the rate is not permitted to go into effect and is subsequently found legal, shippers and consumers as well as the carrier, who would have benefited from the rate, have no remedy whatsoever for injuries suffered by reason of the suspension.

STATEMENT

Petitioners are a barge line (Arrow), a municipality served thereby (Guntersville), a grain merchant located in that municipality (Walls) and a user of grain shipped from that municipality by truck (Bagwell). (R. 6) Neither Guntersville nor Bagwell is located on the system of respondent Southern, and neither Walls nor Bagwell is a shipper on that system. (R. 17, 38, 45-46) Bagwell is not located on any railroad. (R. 38)

In this case petitioners seek reversal of a decision of the Court of Appeals for the Fifth Circuit. (R. 116-125) That court on September 7, 1962, unanimously affirmed a District Court judgment denying petitioners' application for an injunction. (R. 52-58) The injunction sought was one to prevent respondent from putting into effect certain reduced rates for the transportation of grain, which rates respondent had duly filed with the Interstate Commerce Commission and were, in accordance with the terms of the Interstate Commerce Act, about to become effective.[1] (R. 8)

---

[1] Petitioner named four railroad defendants in its complaint in the District Court. (R. 4-5) The defendants other than respondent Southern entered appearances but filed no responsive pleadings and have taken no active part in the ensuing litigation. Respondent here appears, of course, only in its own behalf.

There is only one issue in this case, and that issue is, as petitioners themselves perforce recognize, a narrow one. (Pet. Br. p. 10) It is whether the courts below were correct in holding that under the scheme of the Interstate Commerce Act an injunction could not properly issue to prevent respondent's rates from becoming effective while those rates were under investigation by the Interstate Commerce Commission, and after the seven-month suspension period specified in the statute had expired. No question is before this Court as to whether the rates petitioners seek to enjoin comply with the standards of the Interstate Commerce Act or whether respondent's motives in publishing them were beneficent or malevolent. Those are concededly matters to be determined by the Interstate Commerce Commission alone, after full hearing.

Petitioners have, nevertheless, indulged in extravagant assertions that this case involves "the latest episode in the war of extermination being waged by the Southern Railway against barge transportation on the Tennessee River" and have characterized respondent's motives as "nothing less than the destruction of the Tennessee River as an artery of commerce . . . ." (Pet. Br. p. 9) For this reason we think it appropriate to put before this Court a summary statement of the history and structure of the rates that petitioners seek to enjoin, as disclosed by evidence adduced in the investigatory proceeding before the Interstate Commerce Commission and by affidavits filed in the District Court.

The rates referred to are the result of an effort by respondent that, with the enthusiastic support of both public and private interests in the Southeast, brought together experts and ideas from many sources to contribute a series of radical transportation innovations. The Southeast is a rapidly developing area with an increasing diversity of economic activity. It consumes a great deal of grain, much of which is imported from elsewhere in the country. (R. 18) Studies undertaken by respondent indicate that the vast quantities of grain being moved into the Southeast from other parts of the country are at the present time carried largely by back-haul "gypsy" truckers and merchant truckers whose rates are exempt from regulation by the Interstate Commerce Commission, with barge lines, also free for the most part from rate regulation, and railroads sharing the remainder of the traffic. (R. 18-19) The high existing rates on that portion of the grain moved by the railroads has in the past tended to provide an "umbrella" over the charges upon the balance of the grain movement.

Respondent decided to attack this problem at its source, by finding methods of cutting rail transportation costs in order to make possible substantially reduced rail rates. Seeking to develop special freight cars with the highest possible ratio of cargo capacity to empty weight, and so designed as to minimize loading and unloading costs, it went outside the railroad equipment industry to Lockheed Aircraft Corporation. (R. 17-18) Here, by application of advanced light metals construction techniques, there were produced so-called "Big John" freight cars with aluminum bodies, especially designed and built for grain movement and with a cargo capacity approximately twice that of conventional box cars used for carrying grain but an empty weight only slightly greater. (R. 19) In order to secure the development and manufacture of these cars on an economically feasible basis it was necessary to acquire them in substantial numbers. Accordingly, respondent purchased a total of 575 of the cars, all of which have been delivered. (R. 137)

To accomplish further economies in operating costs respondent concluded in the first instance to make the rates applicable only to movements in five, ten and twenty car lots, which permit substantial savings in switching service at plants and in classification and transfer, and to provide under them only bare transportation with no costly in-transit privileges and with strict demurrage rules and demurrage charges higher than those ordinarily imposed, all designed to keep to an absolute minimum the time these expensive cars are out of transportation service. (R. 19) Cost studies made by respondent have indicated that under all these circumstances the rates will yield more than 140 per cent of costs. (R. 22)

At the outset, the rates were made applicable to grain movements from the river crossings on respondent's system at Cincinnati, Louisville, Evansville, St. Louis and Memphis to points on its system in the Southeast. When it became apparent, during the course of the Commission investigatory proceeding, that a demand might exist for these rates to and from other points, respondent offered on the record to extend them to and from any point on its system where they are desired, whether such point is on a river or inland. (R. 17) In response to the suggestion that the rates might be unfair to the small shipper because they applied only to multiple-car lots, respondent also offered on the record to publish, at the time the multiple-car rates go into effect, comparable single-car rates higher only in the amount necessary to cover the increased costs of handling such shipments.[2] (*Ibid.*)

The applicability of the rates in no way depends upon whether the grain involved is grown at the point of origin or whether any previous shipment has been by rail, barge or other mode of transportation. The rates are based on a mileage scale and in every instance are directly related to the short-line railroad mileage from origin to destination. (*Ibid.*)

Respondent filed its new schedules in July 1961. (R. 16) On August 7, 1961, the Commission's Board of Suspension suspended their effectiveness for the seven-month period authorized by Section 15(7) of the Interstate Commerce Act, and an investigatory proceeding was instituted as required by the statute. During the course of the hearing respondent agreed to extensions of the suspension period for five additional months to compensate for various delays. As so extended the suspension period expired on August 7, 1962.[3] (R. 16-17)

The evidentiary hearing before an examiner began on January 8, 1962. (R. 23) Early in the course of that hearing it became apparent that respondent's belief that the proposed rates would serve an important public need in the Southeast was widely shared not only by shippers but by various state and federal governmental units. Although the rates were protested by some barge lines, certain large receivers of grain by barge, the Tennessee Valley Authority, flour milling interests and certain boards of trade outside the Southeast, and others who expected to feel their competitive impact, they were enthusiastically supported by the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utility Commissioners, state regulatory commissions throughout the South and in many of the Western grain growing states, numerous farmer organizations and receivers and users of grain throughout the Southeast.

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[2] These developments, which occurred well after the rates were suspended by the Interstate Commerce Commission (see *infra*), at the very least throw serious doubt on petitioners' contention that the rates are "grossly discriminatory" as to single-car shippers and as among localities.

[3] Respondent declined to make any further voluntary suspension of the rates because it was unwilling to disrupt business transactions planned by shippers in anticipation of their going into effect, and because it and the people of the South had already been deprived, without possibility of redress, of the benefits of the rates for an extended period. (R. 16-17)

Respondent's case-in-chief was completed February 8, 1962; that of protestants on June 11, 1962. Respondent's rebuttal case, largely prepared in writing and submitted to protestants in advance, ended on August 29, 1962, at which time the hearing closed. A large portion of the time devoted to respondent's case-in-chief and rebuttal was taken up with extended cross-examination by the protestants of witnesses for respondent and supporting intervenors. (R. 23-24)

On July 27, 1962, petitioners filed in the District Court for the Northern District of Alabama a complaint seeking to enjoin the rates, following the expiration of the statutory suspension period, until such time as the Commission should have entered its decision.[4] (R. 4-12) The Interstate Commerce Commission did not join in the complaint, nor did it participate in the litigation by way of intervention or as *amicus curiae*. Respondent answered and moved to dismiss, urging that under the Interstate Commerce Act the exclusive authority to suspend rates filed by a carrier is lodged in the Interstate Commerce Commission.

On August 2, 1962, the court denied petitioners' application for a preliminary injunction, holding that it had no authority to grant the relief sought,[5] and on September 7, 1962, the Court of Appeals for the Fifth Circuit unanimously affirmed, characterizing the relevant statutory provision, Section 15(7) of the Interstate Commerce Act, as "a model of clarity." (R.

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[4] In their complaint, which, as noted above, was directed to four defendants, petitioners charged *inter alia* that the new rates were the product of a conspiracy unlawful under the antitrust laws. In this Court petitioners have completely abandoned this charge, no doubt in part because of its inherent incredibility in light of the lack of enthusiasm of the other railroads, lacking respondent's special equipment, for the new rates, and in part because of the specific provision of § 16 of the Clayton Act, 15 U.S.C. § 28, which prohibits maintenance of a private suit for injunction based on such grounds. See pp. 51-52, *infra*.

[5] The District Court found that denial of injunctive relief might subject petitioners to irreparable injury. (R. 58) Contrary to the Government's suggestion (Gov't Br. p. 12n.), however, it did not find the kind of "extreme hardship," going well beyond accepted standards and concepts of irreparable injury, that the Government urges as alone justifying judicial intervention. And it is significant that the court made no findings, and apparently gave no consideration, to the countervailing equities, in terms of irremediable injury to individual shippers and to the economies of the Southeastern states as well as to respondent, that would result from an injunction against the rates, particularly in light of their previous involuntary suspension for a seven-month period.

121) On October 16, 1962, this Court granted a petition for certiorari to review this judgment.[6] (R. 143)

SUMMARY OF ARGUMENT

The statutory language which controls this case could scarcely be plainer. Section 15(7) of the Interstate Commerce Act grants to the Interstate Commerce Commission the authority to suspend new rates filed by a railroad for a maximum period of seven months and expressly provides that at the end of that period the rates "shall go into effect" even if the Commission's investigation of them has not been completed.

The terms of the statute, prescribing a limited period of suspension after which rates are to be permitted to go into effect without judicial interference, reflect a conscious accommodation by Congress of conflicting interests. Acceptance of petitioners' position that the time limitation on the suspension power is illusory because the courts are free to disregard it would not only require a disregard of unequivocal language but would skew the balance that Congress so carefully struck.

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[6] Despite the holding of both courts below that petitioners were not entitled to injunctive relief against respondent's rates, brief restraining orders issued by the courts below and an extension of those orders granted by Mr. Justice Black have to date given petitioners the full measure of relief sought by their complaint. This has happened without respondent's being protected by the kind of bond to which it clearly would be entitled if an injunction were issued on the merits, against losses resulting from its inability to put its rates into effect between the expiration of the suspension period and the date of their approval by the ICC.

The Government expressly notes that if petitioners are to be given the relief they seek that relief "might be accompanied by appropriate conditions, such as the posting of a suitable bond." (Gov't Br. p. 46)

The legislative history of what is now Section 15(7) of the Interstate Commerce Act confirms Congress' intent, clearly expressed in the words of the statute, that the Commission's suspension power is to be exclusive, and that the courts are not free to lengthen the period of suspension by way of injunction. That history shows that Congress deliberately rejected, on the one hand, a suspension period so short as not to be truly meaningful and, on the other, a suspension lasting, as petitioners would here have it last, until the Commission finished its investigation and approved the new rates.

Within a year of the adoption of what is now Section 15(7) the Interstate Commerce Commission construed it as precluding suspension other than by the Commission. The Commission takes the same position today. And this Court, in *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429, has ruled that the power of suspension "was entrusted to the Commission only."

Upon petitioners' reading of the statute, Congress would have acted quite irrationally. For although it concededly granted the sole authority initially to suspend rates to an expert administrative agency and carefully limited that authority in point of time, on petitioners' view it would at the same time have decided that the courts—less competent than the agency itself to make the judgments necessary to determine whether suspension should be granted—should be free to ignore the time limitation on the agency's authority. There is no justification for disregarding explicit statutory language to reach this bizarre result.

The "related statutes" on which petitioners rely have no bearing on the proper construction of Section 15(7). The National Transportation Policy is a directive to the Interstate Commerce Commission, and here it is conceded that the Commission has no duty or authority to take any action. Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22, is of no help to petitioners because the remedy which they seek can on no view be characterized as one that existed at common law prior to the passage of the Interstate Commerce Act. And the implications which petitioners seek to derive from the statutory provisions for review of Interstate Commerce Commission orders, 28 U.S.C. §§ 2324, 2325, are unwarranted both because petitioners misconstrue those provisions and because in any event they would not support the granting of an injunction by a single judge prior to any Commission decision or order.

Petitioners' argument that denial of injunctive relief would raise "grave constitutional difficulties" is without merit. The interest petitioners seek to assert is no more than the interest in being free from competition, and this interest is not protected by the Constitution.

ARGUMENT

I.

CONGRESS DELIBERATELY VESTED IN THE INTERSTATE COMMERCE COMMISSION ALONE THE POWER TO SUSPEND THE EFFECTIVENESS OF NEW RAILROAD RATES AND CONSCIOUSLY LIMITED THAT POWER IN POINT OF TIME

This case presents a question of the proper construction of a statute that the court below correctly characterized as "a model of clarity."

The statute involved, Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides that when a tariff setting forth a schedule of rates is filed by a carrier the Interstate Commerce Commission, upon complaint or upon its own initiative, may enter upon a hearing concerning the lawfulness of any rate, fare, charge, etc., embodied in the tariff and, pending its hearing and decision,

> "upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; . . . If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, classification, regulation, or practice shall go into effect at the end of such period."

Statutory language could scarcely be plainer. By this section Congress has confided to the Interstate Commerce Commission the power to suspend for a limited period rates filed by railroads while it investigates their lawfulness. That power is confided "to the Commission only." *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429. As this Court, speaking through Chief Justice Hughes, declared in the cited case:

> "When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, al-

> though temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation [citations omitted]. *This power of suspension was entrusted to the Commission only.*" (Emphasis added).

The words of the statute, prescribing a limited period of suspension to be invoked in the discretion of the expert body entrusted by Congress with railroad rate regulation, after which rates are automatically to go into effect without further interference, reflect an accommodation of conflicting interests that Congress deliberately adopted after considering and rejecting other possible procedures and solutions. Acceptance of the petitioners' position that the time limitation on the suspension power provided in the statute is illusory—that it is, in fact, no limitation at all—would not only require a disregard of unequivocal language but would render largely meaningless the heated struggle that took place in Congress as to the appropriate maximum period for which the exercise of that power should be authorized and would skew the balance that Congress finally struck. It would substitute for the compromise that Congress deliberately adopted a principle whereby the risk of loss occasioned by the time lag necessarily involved in an adjudication by the Interstate Commerce Commission of the legality of reduced carrier rates would, instead of being equitably shared by those who stand to gain and lose therefrom, fall wholly on the rate-making carrier and the public it serves. Indeed, it is noteworthy that even the Government has been unwilling to embrace petitioners' position in this respect, but rather has expressly conceded that it is apparent that Congress in adopting what is now Section 15(7) of the Interstate Commerce Act placed limitations not only on the power of the Commission to suspend carrier-initiated rates, but also on what the Government contends would otherwise be the authority of the courts to do so.[7]

A. SECTION 15(7) OF THE INTERSTATE COMMERCE ACT, INCLUDING THE TIME LIMITATION UPON THE INTERSTATE COMMERCE COMMISSION'S POWER TO SUSPEND RAILROAD RATES, REPRESENTS A CAREFUL BALANCING OF CONFLICTING INTERESTS THAT WOULD BE DISRUPTED BY JUDICIAL EXTENSION OF THE SUSPENSION PERIOD.

Section 15(7), as it has evolved since the substance of its provisions was added to the Interstate Commerce Act in 1910, is an expression of a carefully-formulated Congressional policy, designed to balance a number of conflicting interests.

The principle of carrier initiation of rates is preserved, but restrictions are placed upon that principle in the interests of shippers, the traveling public and competitors. Thus by this statute Congress "cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect . . . ," *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 479, by giving to the Interstate Commerce Commission a wholly discretionary power to suspend carrier-initiated rates, a power the exercise of which another agency, acting under a statute modeled on Section 15(7), compared to "the issuance of a preliminary injunction." *Air Freight Forwarders Ass'n, Motions*, 8 C.A.B. 469, 474 (1947); see also *Suspension of Rates on Packing-House Products*, 21 I.C.C. 68, 70 (1911). When the power is exercised the carrier is deprived during the suspension period of the benefits its business judgment indicated that it would derive from new rates, and in the event of a rate reduction the public is likewise deprived of the benefits that the new rates would bring to it. This deprivation is irreparable, for neither carrier nor public is given any means of recouping that loss even though the new rate proves ultimately to be completely lawful.

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[7] The Government has, however, refused to accept the inevitable consequences of its concession, and urges that although the authority of the equity courts in this area has been greatly diluted it has not been altogether extinguished. That this position is altogether untenable we shall demonstrate below.

It is not at all surprising that, in thus significantly limiting the rights of the rate-making carrier as they existed at common law, Congress was also concerned that the burden imposed by the new scheme of regulation should be to some extent distributed. It is natural, therefore, that Congress concluded that the suspension power should be limited in time—today to seven months, a period thought to be adequate in most cases to permit the Commission to make its determination of the lawfulness of the questioned rates. Thereafter the carrier was no longer to be required to bear the entire burden of the new system by being further denied the right to put the rates into effect. Persons who could demonstrate legally cognizable injury by reason of the rates were remitted to a remedy in damages should the rates prove to be unlawful, 49 U.S.C. § 8, and, in the event the rate change was an increase, shippers were given the additional protection of a provision empowering the Commission to require the carrier to account for and refund rate increases that were subsequently found unlawful.

As we shall show below, this equitable compromise of competing interests was no mere accident. Congress was not haphazard. Rather it was deliberate, rejecting alike the alternatives of a suspension so short as not to be truly meaningful and a suspension lasting until the Commission finished its investigation and approved the new rates. And later, after several years of experience under the balance that it had struck, it amended, and thereafter again amended, the statute in response to the lessons of experience and changing circumstances. Throughout, it made the Commission the exclusive instrument for carrying out its policy, deliberately closing the door to the possibility of sporadic action by other instrumentalities of justice, which must inevitably disrupt the carefully-worked out statutory scheme.

B. THE HISTORY OF THE SUSPENSION POWER LEGISLATION CONFIRMS THAT ONLY THE ICC CAN SUSPEND A RAILROAD RATE AND ONLY FOR THE STATUTORY PERIOD PRESCRIBED.

When as here the statutory language is direct and unambiguous, and given its natural meaning produces an altogether rational result, there is no room for the kind of "construction" in which petitioners and the Government would have this Court engage. *Yates* v. *United States*, 354 U.S. 298. And by the same token, under these circumstances there is no occasion for resorting to legislative history to attempt to conjure up doubts as to the meaning of a provision that is plain on its face. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (concurring opinion); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269. If one does turn to the legislative history here, however, no shadow is cast upon the statutory language. Rather those sources confirm the meaning apparent on its face.

1. THE MANN-ELKINS ACT.

What is now Section 15(7) of the Interstate Commerce Act came into that law as a provision of the second of the historic groups of amendments that made of the Interstate Commerce Commission a vital and effective regulatory body. This was the Mann-Elkins Act of 1910.

The first group of amendments was the Hepburn Act of 1906. That statute, among other things, gave to the Commission the power to prescribe maximum rates for the future, the power that this Court held in *ICC v. Cincinnati, N.O. & T.P.R. Co.,* 167 U.S. 479, the Commission lacked under the original Act to Regulate Commerce.

Although the Hepburn Act was a monumentally important step toward real rate regulation by the Commission, problems still remained. The Commission was empowered to act only upon complaint and as to a rate that was in effect. In a time of industrial recovery, when the carriers were increasing rates throughout the country, the Commission regarded as a serious deficiency its inability to place some restraint on such increases pending determination of their lawfulness. See 1 Sharfman, *The Interstate Commerce Commission* 49-52. So it was that in its annual reports beginning in 1907 the Commission urged Congress to grant it the power to suspend increased rates while it investigated them. ICC Ann. Rep., 1907, pp. 9-10; *id.*, 1908, pp. 10-12; *id.*, 1909, pp. 6-7.

The Commission noted that some shippers had attempted to plug the gap it saw in the Interstate Commerce Act by recourse to the courts. But it noted also that the courts disagreed as to whether relief by way of an injunction against a rate change pending a hearing before the Commission could be had.[8] The Commission went further and said that the makeshift judicial remedy, even assuming its existence, was altogether unsatisfactory and created serious problems of its own by way of "confusion and discrimination." See, *e.g.*, ICC Ann. Rep., 1909, p. 6.

The confusion and discrimination as to which the Commission expressed concern arose not only from the disagreement among the courts as to their power in the premises but also from the fact that, where jurisdiction was taken, the judicial power did not appear able adequately and equitably to cope with the problem presented. Thus, for example, carriers were sometimes compelled to maintain one rate in their published tariffs but collect another. ICC Ann. Rep., 1908, pp. 11-12. Further, in the case of joint or through rates where a plaintiff succeeded in obtaining jurisdiction over only one carrier party to the rate, that carrier might be enjoined from collecting the charge published in its tariff on file with the Commission, while at the same time its partner was obliged, at the risk of severe statutory penalties, to collect the charge specified in that tariff. *Id.*, p. 12. There was discrimination because in many cases not all affected shippers joined in the injunction suit, and therefore, in at least one instance, "an injunction has been issued in favor of the complainants alone, so that at the present time the general public is paying the advanced rate, while the complainants are being charged the old rate." *Id.*, 1907, p. 10.

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[8] The cases are collected at p. 12 of petitioners' brief. The question was mooted in this Court but not decided in Southern Ry. v. Tift, 206 U.S. 428, and was finally set to rest in Board of R. R. Comm'rs v. Great Northern Ry., *supra*, where the Court approved the pre-1910 cases disclaiming jurisdiction and disapproved those in which jurisdiction had been found to exist.

Beginning with these pleas of the Commission itself to Congress for remedial legislation, with their recognition that the judicial remedy was not only insufficient but actually repugnant to basic purposes of the Act, three strands run through the history of the suspension provision of the Mann-Elkins Act insofar as that history is relevant to the question in this case.

First, there was general agreement that the suspension power should be confided exclusively to the Interstate Commerce Commission as the expert body that alone could assure uniformity in its exercise and bore the ultimate responsibility for rate regulation. The existing situation was satisfactory to no one. There was no disposition to continue to place any reliance upon the federal courts acting pursuant to a dubious kind of jurisdiction, which had not been sustained by this Court and was, indeed, disapproved by it in retrospect in *Board of R.R. Comm'rs* v. *Great Northern Ry., supra,* and which depended upon allegations of illegality that concededly raised questions appropriate for decision in the first instance only by the Interstate Commerce Commission, after hearing, and not by the courts.

Second, there was disagreement as to whether the Commission should be permitted to suspend a tariff filing for a limited time only or for the entire period required to conclude its investigation of the questioned rate. At times the disagreement was sharp, particularly on the floor of the Senate where the debate over the bills that became the Mann-Elkins Act became embroiled in the mounting political dispute of that day—between insurgent and regular Republicans. The advocates of a suspension power limited in time, who urged that shippers as well as the carriers should bear some of the risk of possible delay in the Commission's proceedings, prevailed. They did so, however, only after, as a compromise, the suspension period was substantially lengthened over what had been originally proposed in order that there might be time enough for the Commission to make its determination in most cases.

Third, it was specifically urged by the proponents of indefinite suspension and specifically acknowledged by the proponents of time-limited suspension that cases would arise in which the Commission would not finish its investigation within the suspension period, so that suspended rates would go into effect before their lawfulness was determined. Nevertheless, with the exception of a few isolated and ambiguous statements made on the Senate floor (see Pet. Br. pp. 8a-11a)—statements made, as we have noted, in the course of an intensely political debate that was thus likely on occasion to be distinguished more for its rhetoric than its logic—there was no suggestion on the part of those who advocated or were willing to accept a time-limited suspension power that the time limitation could be subverted by resort to the kind of lawsuits that had proved so productive of chaos. In short, there was no thought of giving back-handed statutory sanction to the very type of judicial actions that had brought the problem to a head. And even more clearly, there was not the slightest indication on the part of any member of the Congress of a belief that, as the Government urges, the bill made posible the invocation of a judicial remedy with respect to rate suspension even if none had theretofore existed.

Early in 1910, President Taft, carrying out a campaign pledge, sent to Congress his recommendations for improving regulation of the railroads. Bills drafted by the Attorney General were introduced in both houses to carry out his recommendations. Much-altered in their course through the Congress, these bills became the Mann-Elkins Act of 1910. On the point here at issue, the President heeded the repeated requests of the ICC that the power to suspend tariffs be vested in it but advocated that the suspension period be limited to 60 days. 45 Cong. Rec. 378, 380.

Hearings were held on the bills by the interstate commerce committees of the two houses. At these hearings one of the principal proponents of the suspension provision was Mr. J. C. Lincoln, president of the National Industrial Traffic League. Speaking for that nationwide organization of shippers, he was emphatic that "the power of suspending proposed rates," which he noted had been exercised by some of the federal courts, "should be placed with the Interstate Commerce Commission, a body better able to determine the equities of the case than the courts, their entire study being one of transportation."[9] *Hearings on Bills Affecting Interstate Commerce, Before the House Interstate and Foreign Commerce Committee*, 61st Cong., 2d Sess. 438. Although some of the members of his organization favored indefinite suspension and he personally thought the suspension period should be ninety days, *Hearings on S. 3776 and S. 5106 Before the Senate Interstate Commerce Committee,* 61st Cong., 2d Sess. 58, 59, his formal position was that the suspension period should be limited to sixty days. *House Hearings, supra* at 438. He took this position in the full knowledge that not every case could be decided in that period but, at the same time, without the slightest hint that the kind of haphazard judicial injunctions of which he was quite aware might be used to supplement the Commission's power when the suspension time proved inadequate.

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[9] This is plainly language of substitution, not mere supplementation.

In a colloquy with Chairman Mann of the House committee, Mr. Lincoln was as much as invited to suggest the availability of a judicial remedy as a supplement to the limited power of the ICC, but he declined the invitation.

> "The Chairman. But the commission has no authority to keep anything in status quo after sixty days' time.
>
> "Mr. Lincoln. They have not, if the railroad insists on putting in its advance; but if the railroad has been favorably impressed with the arguments received they would no doubt ask for authority from the commission to take an extension of the time.
>
> "The Chairman. But if the railroad was obstinate, it might go on; you could not prevent that?
>
> "Mr. Lincoln. No; not after sixty days, unless it was settled before the expiration of the sixty days . . . ." *House Hearings, supra* at 445.

The ICC, which in its annual reports had seemed to suggest suspension until its investigation was concluded, ultimately recommended to the Congressional committees that instead the sixty-day suspension period urged by President Taft be lengthened to 120 days. See S. Rep. No. 355, 61st Cong., 2d Sess., pt. 1, p. 9. The House committee adopted this suggestion in the bill it reported to the floor. H.R. Rep. No. 923, 61st Cong., 2d Sess. 11. The Senate committee initially adhered to the President's sixty days, S. Rep., *supra*, pt. 1, pp. 8-9,[10] but on the floor accepted 120 days as a committee amendment, 45 Cong. Rec. 6463-64. Two insurgent Republicans, however, urged in a minority report an indefinite suspension power. S. Rep., *supra*, pt. 2, p. 9. This disagreement within the Senate committee set the stage for the debate on the Senate floor over the terms of the grant of the suspension power.

On behalf of the insurgent Republicans, Senator Cummins, who was one of the committee dissenters, offered an amendment whereunder all rate increases would be suspended "until after full hearing" by the ICC. 45 Cong. Rec. 6409.[11] He and his fellow insurgents emphasized that (a) it was unfair to require shippers to pay increased rates that had not been approved by the Commission, (b) the Commission could not be expected to complete its proceedings even in 120 days, (c) reparations were not an adequate remedy and (d) the railroads were better able than the shippers to bear any loss resulting from delay in the Commission's proceedings. See *id.* at 3373-75, 6500-01, 6510-11 (Senator Cummins); 5329 (Senator Dolliver); 6900-01 (Senator LaFollette).

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[10] The majority report noted that the suspension power proposed in the bill was a new one which should be limited to "a reasonable period," and that the 60-day period proposed was believed to be reasonable because it was "a length of time which can not possibly work any serious hardship to the railroad companies, and which, on the other hand, will afford the commission opportunity with due diligence to complete or, at all events, to make substantial headway in any such investigation."

[11] The discretionary power of the ICC to investigate and suspend for a limited period would have continued to apply to rate changes other than increases. *Id.* at 6777.

On the other side it was urged that an indefinite suspension was unfair to the railroads, which could not recover the losses incurred during the suspension period even though the increased rate eventually was approved, and that the ICC might, under the amendment, prevent rate increases simply by failing to complete its investigation. *Id.* at 3472, 6503 (Senator Elkins); 4109-10 (Senator Root); 6509, 6787-88 (Senator Sutherland); 6782 (Senator Jones). In the course of debate on the Cummins amendment there began to be talk of a compromise whereby the suspension period would be increased to six months. It was suggested further that this might be accompanied by a provision that if the railroads could not convince the Commission of the validity of an increase within that period the increase would be denied. See *id.* at 6783-84, 6788, 6789.

Senator Clarke opposed this refinement and urged that if the six-month period was adopted, rates should go into effect upon its expiration even if the ICC had not by then acted. In doing so he restated the reasons that underlay the limited suspension proposals. Thus, he said, "there is no particular injustice in allowing the railway company" to charge the new rates after six months if the hearing was not completed by then, and by that time the railroad "has endured about as much of the loss and inconvenience incident to an effort to promote the public good as justice and fair dealing require." Moreover, he said that "if there be a hardship in a controversy of that sort arising from the inefficiency or imperfection of the remedies, it ought to be shared to a certain extent, particularly as the public always have the final remedy in the power of the commission to fix the proper rate when it shall get to the end of the controversy." *Id.* at 6787; see also *id.* at 6782 (Senator Jones). Here again the approach is one of compromise, for there is no suggestion that the shippers might simply deposit their share of the burden of hardship upon the carrier by resort to the courts.

Finally, the Cummins amendment was put to a vote and defeated. *Id.* at 6915. Meanwhile, Senator Jones had proposed an amendment whereby the 120-day suspension period could be extended for an additional period up to six months, *id.* at 6847, and Senator Paynter had offered an amendment requiring the carriers to keep accounts of the amounts collected under rate increases that became effective prior to the ICC decision and refund such amounts to the shippers if the increases were disallowed, *id.* at 6916.

Senator Elkins, the committee chairman and the floor manager for the bill, announced his support of the Jones amendment, which he described as "fair and just." *Ibid.* Immediately thereafter in answer to questions Senator Jones stated explicitly and without objection that under his proposal rates would go into effect upon expiration of the suspension period if the Commission's hearings had not been completed. *Id.* at 6916-17. Senator Jones then accepted the Paynter amendment, dealing with keeping accounts and making refunds, as an addition to his own. *Id.* at 6920-21. The Jones amendment, as thus supplemented, was adopted unanimously. *Id.* at 6921.

Thereafter, during its consideration of the provisions of the bill creating the Commerce Court the Senate defeated an amendment offered by Senator LaFollette that would have given the Commerce Court the authority to grant the kind of remedy sought by petitioners here, by conferring on that court jurisdiction of suits by shippers or other interested persons to suspend or enjoin rates pending a final determination by the ICC, where it appeared that enforcement of the rate would deprive the complainant of property without due process of law or just compensation or cause him irreparable injury, and the ICC either had not suspended or did not have the power to suspend the rate. See *id.* at 7260-64. Then the bill, including the supplemented Jones amendment, was passed, 50-12. *Id.* at 7375.

In the House, where the floor debate on this provision preceded that in the Senate, the principal dispute also concerned whether the suspension power should be limited in time—to 120 days under the bill reported by the House committee—or should be indefinite. The same considerations as were advanced in the Senate were urged in the House on both sides. See *id.* at 5163, 5843-49. The upshot was that an amendment providing for an indefinite suspension period was defeated by a vote of 92-62, *id.* at 5849, and the House bill as passed contained the 120-day suspension period, *id.* at 6032-33.

In the conference the Jones amendment adopted in the Senate, empowering the Commission to suspend for an additional six months beyond the 120 days allowed by both bills, was retained, but without the Paynter record-keeping and refund supplement. 45 Cong. Rec. 8239, 8473. Once more it was made clear that rates would go into effect if the Commission had not acted at the end of the suspension period, which might be as long as ten months, 45 Cong. Rec. 8370, 8387, and on this understanding the conference committee version of the bill was adopted by both houses, 45 Cong Rec. 8391, 8485.

Senator Cummins, who had fought so hard for an unlimited period of suspension, specifically recognized the nature of the compromise made by the bill. He summarized the provision in its final form by stating that "under this bill—and it was the best we could do—all increases in rates go into effect at the end of ten months, if the commission has not during that period been able to pass upon them." 45 Cong. Rec. 8387.

Section 12 of the Mann-Elkins Act, then, as finally enacted, amended Section 15 of the Interstate Commerce Act to authorize the Commission to investigate a newly-filed rate, charge, etc., upon complaint or on its own initiative and to provide further that the Commission, pending its hearing and decision,

> "may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within

> the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months." 36 Stat. 552.

In seeking the solution to the question posed by this case, there is much to learn from these pages of history. For we stand on a battlefield of an earlier day, where the deepest insight comes from knowledge of what the fight was about.

In the battle that we have reviewed the issue was where the power should reside to change rates—in the railroads or in the Interstate Commerce Commission. The insurgents battled to empower the Commission, and the Commission alone, to control the process of rate change, by providing for automatic or discretionary suspension of rates filed by the railroads until it had investigated them and found them reasonable and non-discriminatory. The Administration fought to secure so far as it could the railroads' prerogative of putting rates into effect and litigating their legality afterward.

We have seen that the Administration started by offering a suspension period of sixty days. The insurgents demanded unlimited suspension until Commission decision. The Administration doubled its offer—four months. It was not accepted. Then the extreme insurgent position was defeated in the Senate. The moment for compromise had arrived. It proved to be an expensive one for the Administration, for the already doubled period of suspension had to be raised one hundred and fifty per cent to ten months. But in this compromise each side won something of value. One side won the principle that, after a specific maximum period of suspension, the railroad was secured in the absolute right to put its rates into effect even though the Commission was still considering them. The other side won a period of suspension long enough so that in most, although as both sides recognized not all, cases the Commission could complete its investigation within it. But to assert that this whole battle was only a pillow fight, because all the time the contestants were reserving to the courts the right to extend any period of suspension, is to distort history. And indeed, petitioners are able to array just two isolated statements on the Senate floor that are claimed to indicate that Congress actually intended to permit the courts to be free to lengthen the period of suspension it had so painfully agreed to.[12]

The first of these is a response by Senator Heyburn to Senator Cummins' advocacy of indefinite suspension. 45 Cong. Rec. 6777 (Pet. Br. pp. 8a-9a). A reading of the statement will show that so far as equitable jurisdiction in the courts is concerned, Senator Heyburn asked Senator Cummins *not* whether it existed generally, but only whether it existed in the special case where the railroad was evidently seeking by a proliferation of evidence to delay and impede the

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[12] The third statement adverted to in petitioners' brief (p. 7a) deals not with the question of the courts' power to suspend under the bill but rather with one Congressman's views as to the scope of judicial power prior to the statute's passage. With this statement may be contrasted that of Representative Mann, floor leader for the bill in the House, who while explaining the Committee proposal expressly noted that "under existing law there is no method by which you can prevent the proposed new rate continuing in force while the commission is investigating the subject as to whether the rate ought to remain in force." 45 Cong. Rec. 4711. See also the comments of Representative Cole at 45 Cong. Rec. App. 88. (Gov't Br. p. 31)

Commission investigation, and when Senator Cummins expressed "grave doubt" that it did, indicated a belief to the contrary.[13] That is not the question presented in this case, and accordingly this passage, even if authoritative, would have no relevance here.[14]

The remarks of Senator Elkins (Pet. Br. pp. 9a-11a) are those of the floor manager of the bill and thus would be entitled to weight—if they were clear and, given the construction petitioners urge, not inconsistent with the terms of the statute and the overwhelming preponderance of the legislative history. They are neither.

The remarks were addressed to Senator LaFollette's amendment to give the new Commerce Court created by the bill a power of suspension in some situations, including cases in which the ICC had not exercised its power to suspend. (See p. 28, *supra*). As petitioners read the passage the remarks suggest that Senator Elkins believed that the LaFollette amendment was unnecessary because the powers which it would confer already existed in the regular federal courts. Whether they did was of course even then highly dubious, as we have already noted, and later this Court ruled in *Board of R. R. Comm'rs* v. *Great Northern Ry.*, *supra*, that they did not. In any event, it is perfectly clear that whatever power the courts may have had prior to 1910 to restrain the effectiveness of rates in the first instance did not survive the Mann-Elkins Act.[15] *Director General* v. *The Viscose Co.*, 254 U.S. 498; *M. C. Kiser Co.* v. *Central of Ga. Ry. Co.*, 236 Fed. 573 (S.D. Ga. 1916), *aff'd*, 239 Fed. 718 (5th Cir. 1917). Thus petitioners are placed in the unhappy position of placing the heaviest reliance on a statement that even construed as they would construe it makes two closely related points one of which—a continued judicial authority initially to suspend rates—they necessarily disavow even while embracing the other.

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[13] The Government points to additional remarks by Senator Heyburn at 45 Cong. Rec. 6793-94 (Gov't Br. p. 32). It is difficult to understand how these remarks aid the Government's position, since (1) they express what the Government recognizes to be the mistaken view that shippers had a *statutory* injunctive remedy against carrier rates prior to the passage of the Mann-Elkins Act, and (2) they in no way support the distinction which the Government seeks to draw between different degrees of irreparable injury. What is significant is that the Government cites no passage in the legislative history which even remotely suggests that Congress, or any member of Congress, intended, as the Government urges, that under the bill as passed there should be a remedy in the courts even if none had theretofore existed.

[14] Petitioners do not claim that respondent is responsible for any delays in the Commission proceeding involved here not compensated for by voluntary extension of the suspension period. (Pet. Br. p. 6).

Further, a reading of the passage shows that it does not support the construction petitioners would place upon it[16] and that indeed it is not susceptible of any clear construction. Under these circumstances it is particularly noteworthy that on the very page of the Congressional Record on which the cited passage appears Senator Elkins stated flatly that under the bill "if the commission does not finish its hearing and investigation [during the first 120 days of suspension] it may take six months longer, after which, if no decision is made, the rate goes into effect. . . . The commission is the tribunal provided by Congress for the protection of the shipper."[17]

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[15] See also the remarks of Senator Burton, 45 Cong. Rec. 7262, which might also be thought to support petitioners' position but which are similarly inconsistent with the settled rule stated in the text.

[16] Thus, for example, that construction is hardly consistent with the statement at the close of the remarks that "it is impossible to carry out in the courts what is in the Senator's mind through the wording of this amendment."

Only eight months after the enactment of the Mann-Elkins Act the Interstate Commerce Commission had occasion to construe the new suspension provision. The Commission unequivocally found that the purpose and result of that provision was not merely to supplement, but altogether to displace any judicial power that might theretofore have existed in the premises. Thus the Commission stated that:

> "[T]he Federal courts [before 1910] found themselves embarrassed by the appeals made to their equity powers against such [rate] increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect, while as to others it was not in effect. With such a history before it Congress deemed it advisable

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[17] Also noteworthy are the terms in which Senator Sutherland replied to Senator LaFollette's proposal:

> "If the Interstate Commerce Commission makes a decision, the effect of which is to deprive the shipper of his property without due process of law, then I can see some occasion for his going to the court. But pending the determination of the Interstate Commerce Commission, which is constituted for this precise purpose, I see no reason whatever for extending to the shipper the right to go to court." 45 Cong. Rec. 7261.

Even the Government grudgingly concedes that this passage "intimated that the administrative remedy was exclusive no matter how long the hearing . . . ." (Gov't Br. p. 34)

> to lodge with this Commission, which alone under the *Abilene case,* 204 U.S., 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can [b]e had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.
>
> ". . . The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continuing instability of rates and consequent commercial disturbance." *Advances in Rates—Western Case,* 20 I.C.C. 307, 313-14 (1911).

Such a contemporaneous construction, reflecting so clearly the informed understanding of the time, would be decisive even were the statute far less clear and explicit than it is. And it is to be noted that the Commission continues to adhere to the same position today. (Gov't Br. p. 1).

2. THE TRANSPORTATION ACT OF 1920

The first significant amendment to the railroad tariff-suspension provisions of the Mann-Elkins Act was made by the Transportation Act of 1920.[18] In this statute, after the period of wartime federal control of the railroads, Congress opted for resumed private management under regulation designed not narrowly as before to curb abuses but affirmatively to encourage adequate transportation service. See *New England Divisions Case*, 261 U.S. 184, 189.

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[18] During and immediately after World War I the suspension provision was largely if not altogether inoperative. By the Act of August 9, 1917, 40 Stat. 270, 272, Congress added a proviso by the terms of which rate increases could not be filed without advance approval of the Commission. The proviso was to be effective only until January 1, 1920, and was designed to give

Congress took the occasion to overhaul various existing provisions of the Interstate Commerce Act, and Section 418, 41 Stat. 487-88, amended Section 15 of the Act. The paragraph dealing with investigation and suspension of rates became Section 15(7), as it now is, and the following language was substituted for the proviso to the original Mann-Elkins Act section:

> "If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by

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Congress the opportunity to "thrash out the problem and decide whether it wants to change the law or not." 55 Cong. Rec. 5810. This proviso was in substance superseded by the wartime assumption of federal control of the railroads. 40 Stat. 1733, 1734. Under the Federal Control Act, 40 Stat. 451, 456, the President, who acted through the Director General of Railroads, was empowered to initiate rate changes that went into effect without advance approval and could not be suspended by the Commission. See generally 1 Sharfman, The Interstate Commerce Commission 59 n. 61, 162-64.

> whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified . . . ."

Thus, (1) the possible period of suspension was reduced from ten months (120 days plus six months) to five months (120 days plus 30 days), (2) the statute was made to provide explicitly that a rate "shall go into effect" at the end of the period if the Commission had not concluded its proceeding and entered an order, and (3) the substance of the Paynter amendment, which had been rejected by the conferees on the Mann-Elkins Act (p. 28, *supra*), was adopted and gave additional protection to shipper interests by authorizing the ICC to require the keeping of accounts and refunds he proceeds of rate increases found unlawful after g into effect.

Th eduction in the possible period of suspension was ac cated by, among others, Commissioner Clark of the ICC. Bespeaking the judgment of the Commission on a bill that provided for suspension for 120 days altogether, *Hearings on H.R. 4378 Before the House Interstate & Foreign Commerce Committee*, 66th Cong., 2d Sess. 30-31, he told the House committee:

> "[R]ecognizing the fact that if the carrier proposed increased rates that are finally found to be reasonable, the suspension of them for 10 months and depriving the carrier of the revenue thereunder for that period is not exactly fair, accompanied by the fact that if the rates are permitted to go into effect and are later found to be unreasonable the shipper may be awarded reparation, whereas

> the carrier cannot possibly collect the higher rates for any traffic that moved prior to the time at which they become effective upon a finding that they were reasonable, it is here proposed that the right of the commission to suspend the operation of such rates or schedules shall be limited to a period of 120 days."

In the same spirit of compromise that emerges so clearly from these words, he went on to say that after the suspension period the new rates would become "automatically effective" and that "if within that 120 days the matter cannot be decided, the rates will go into effect, but the investigation will proceed and the decision of the Commission will be made after the rates have gone into effect." *Id.* at 31; see also *id.* at 91.[19] The floor manager for the bill in the House, Representative Esch, also expressed the view that ten months' suspension was unfair to the railroads, stated that "the increased rates go into effect nevertheless" if the Commission had not decided the case by the expiration of the 120 days and saw the refund requirement as an offsetting advantage to shippers. 58 Cong. Rec. 8317.

Although there was considerable discussion before the committees of both houses of the desirable length of the suspension period and recognition that whatever the period there would be cases in which the Commission had not entered an order by its expiration, *House Hearings, supra* at 1223-24, 1625-28, 2235-38, 2944-45; *Hearings on Extension of Time for Re-*

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[19] See also the testimony of the President and General Solicitor of the National Association of Railroad and Utility Commissioners that under the bill if an investigation were not completed at the end of the suspension period "the rates must go into effect . . ." *Id.* at 1626.

linquishment by the Government of Railroads to Corporate Ownership and Control Before the Senate Interstate Commerce Committee, 66th Cong., 2d Sess. vol. 1, pp. 511-12, 738, vol. 2, pp. 108-09, 1953-54, there was no suggestion on any side that the period might be lengthened in some cases by judicial action.

In explaining its reconciliation of differences between the Senate and House bills,[20] the conference committee, like Commissioner Clark and Representative Esch, said that under both versions, at the end of the suspension period the rates "were to go into effect whether or not the Commission had concluded its hearing ..." H.R. Rep. No. 650, 66th Cong., 2d Sess. 66. And, of course, the statute was made to say exactly that.

Petitioners and the Government both seek to avoid the effect of the unequivocal words of the amended statute—"the proposed change of rate . . . shall go into effect"—by contending (Pet. Br. p. 21; Gov't Br. p. 22) that they refer only to Commission action, but that is not what the words say. Also, ignoring the testimony of Commissioner Clark, the remarks of Representative Esch and the authoritative report of the conference committee, petitioners seize on the fact that in explaining the bill at the opening of the Senate debate, its sponsor, Senator Cummins, did not refer to the "shall go into effect" phrase as making a significant change. This is not at all surprising. The phrase merely spelled out what the statute had provided since 1910, as Senator Cummins, the 1910 advocate of indefinite suspension, was well aware. He had been clear then that the Commission's power was exclusive (see p. 29, *supra;* Pet. Br. pp. 8a-9a), and his belief had been confirmed by the only court that had considered the subject between 1910 and 1920, *M. C. Kiser Co.* v. *Central of Ga. Ry.*, 236 Fed. 573 (S.D. Ga. 1916), *aff'd*, 239 Fed. 718 (5th Cir. 1917),[21] and by the Interstate Commerce Commission itself, *Advances in Rates—Western Case, supra.*

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[20] Only the House bill included the record-keeping, refund provision, and it provided only for 120 days' suspension. The Senate's inclusion of the additional 30-day possible suspension was accepted.

Indeed, the fact that there was no comment on or discussion of this new phrase is itself the strongest possible support for the view that if any legislator had earlier been of the view that the 1910 statute did not preclude judicial intervention he was either of that view no longer or willing to accept a change without objection. For it is inconceivable that this language, which to both courts below was so clear as to foreclose any argument that a judicial remedy could exist consistently with it, would not once have been questioned or challenged if any significant body of legislators believed, or intended, that in fact new rates should ***not*** go into effect at the end of the suspension period if a court could be prevailed upon so to decree.

3. The 1927 Amendment

In 1927 the Interstate Commerce Commission informed Congress that "it was unable to make the necessary investigation and determination" within the period prescribed in Section 15(7) as amended in 1920. S. Rep. No. 1508, 69th Cong., 2d Sess. 4. In response Section 2 of the Act of March 4, 1927, 44 Stat. Pt. 2, 1447-48, amended Section 15(7) to make it read as it now does in its pertinent provisions. Testifying in support of the bill, which lengthened the maximum permissible suspension period from five to seven months, Commissioner Esch noted that "the present law provides an aggregate period of 5 months, after which suspended rates automatically become effective, unless the Commission shall have previously passed thereon or unless the carrier voluntarily postpones the effective date for a longer period." [22] Moreover, the "shall go into effect" phrase was so placed that, as petitioners acknowledge (Pet. Br. p. 22), it is no longer susceptible at all to their strained argument that it refers "to a sequence of events in terms of Commission action alone" (*id.* at 21). Again, no voice was heard to inquire about, or to protest, this language, which even petitioners implicitly concede was now on its face susceptible of no construction save one contrary to their view.[23]

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[21] See 236 Fed. at 576. "The court is inclined to think the intention of Congress was to make the remedy provided by the amendment exclusive."

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[22] Hearings on H.R. 6359 Before the House Interstate and Foreign Commerce Committee, 69th Cong., 1st Sess. 8. This statement is particularly noteworthy because (1) Commissioner Esch had seven years earlier as a member of the House of Representatives been floor manager for the 1920 bill, and (2) although the Commissioner expressly adverted to a situation wherein rates would not become effective at the end of the suspension period, he did not mention as another such circumstance a judicial extension of that period.

[23] It is significant that even though the Senate committee that considered the ICC's request said the purpose of suspension was "to prevent the new rate from becoming effective until the question of its justness and reasonableness can be determined," S. Rep. No. 1508, 69th Cong., 2d Sess. 4, Congress retained the concept of a time-limited suspension power and made the statute reflect even more clearly than before, as pointed out in the text, recognition that there would be cases in which the investigation was not concluded within the suspension period and that rates under investigation should nevertheless go into effect upon the expiration of that period.

As we have indicated, petitioners maintain that the statutory language and the legislative history that illuminates it leave them unscathed because they deal not with judicial power but rather solely with the authority of the Interstate Commerce Commission. Although this position is, as we have shown, erroneous, it at least has the virtue of internal consistency. The Government, on the other hand, has rejected petitioners' position but at the same time has refused to accept the inescapable consequence of that rejection, the conclusion that the statute means what it says in providing that after the suspension period has expired the rates "shall go into effect . . . ." Rather, the Government would apparently seek to introduce to equity jurisprudence an altogether new concept—one, so to speak, of *extremely* irreparable injury, or "virtual destruction of the complainant.[24] (Gov't Br. p. 45). Applying this standard, the Government would rewrite the statute to say that at the end of the suspension period theretofore suspended rates shall almost, but not quite, always be permitted to go into effect.

Support for this novel position is said to be found in the fact that Congress is not shown in the course of its debates extensively to have discussed the case of rate-caused injury of a kind that the Government hypothesizes and urges to be alleged in this case; that is, not merely irreparable injury of a degree that under traditional principles would justify the intervention of equity, but injury far more severe. (Gov't Br. p. 23) This fact, however, is altogether without significance for these reasons: first, on no reading can the relevant statutory language be said to permit of the distinction the Government seeks to draw, and second, the Government has altogether failed to demonstrate that at the time of the adoption of the statute the legislators recognized the existence of any distinction between the standard it would here apply and the familiar equity concept of irreparable injury. Particularly absent such a demonstration, a Congressional determination that judicial intervention and interference should be precluded even in cases of irreparable injury—a determination that the Government concedes—must be deemed to be a determination that such intervention and interference should be precluded no matter what the degree of potential injury shown.[25] For to hold otherwise would be to introduce a distinction and draw a line which the Government does not suggest any way of deriving from the terms of the statute and which by hypothesis could not have been in the minds of the legislators. That such a step would be unjustified becomes especially apparent when it is recognized that the Government urges not simply, as do petitioners, that Congress did not in the statute extinguish a previously existing remedy, but that the effect of the statute was to permit utilization of a judicial remedy even if such a remedy ~~could not have~~ been invoked prior to its passage.

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[24] The Government at several points in its brief seems to suggest as an additionally relevant standard the prospect of "gross discrimination against shippers and localities." (See, *e.g.*, Gov't Br. p. 15) It seems apparent that any such standard is of no relevance per se; it at most could be relevant only to the extent that the kind of injury which the Government postulates can be demonstrated to result from it, for in itself it is a standard not of injury but rather of legality.

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[25] The Government expressly concedes that "Congress can hardly have failed to perceive that substantial and sometimes irreparable hardship was bound to fall upon one side or another" (Gov't Br. p. 12), and recognizes that Congress determined, in these situations anticipated by it, that there should be no judicial power to restrain rates.

At bottom, the Government's position amounts to no more than speculation that if it had specifically focused on the most egregious possible case of irreparable injury Congress, while adhering to what is conceded by the Government to be its command that rates are to go into effect at the end of the suspension period despite the prospect of "ordinary" irreparable injury, would have been moved to carve out an exception to that rule. This argument is on its face one addressed to legislative rather than judicial considerations, and to a degree even greater than petitioners' position is incompatible with the terms of the controlling statute. In short, the statute either means what it says or it does not; the "it does and yet it doesn't quite" position of the Government is simply untenable.[26]

* * *

Since Section 15(7) took its final form this Court has construed it in *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429, as precluding suspension other than by the Commission, and the leading commentator on Interstate Commerce Commisson law has summarized it in the same terms.[27] Congress has used the section as a model for other regulatory statutes. In each instance the ICC or some other regulatory agency has been given the authority to suspend newly-filed rates for a limited period and it is provided that at the end of that period such rates are to go into effect, and it has never been suggested in the legislative history of any of these statutes or in cases under them that the period specified may be extended by judicial intervention. See Motor Carrier Act, 49 U.S.C. §§ 316(g), 318(e) (since 1935); Water Carrier Act, 49 U.S.C. § 907(g), (i) (since 1941); Freight Forwarders Act, 49 U.S.C. § 1006(e) (since 1942); Federal Communications Act, 47 U.S.C. § 204 (since 1934); Federal Power Act, 16 U.S.C. § 824d(e) (since 1935); Natural Gas Act, 15 U.S.C. § 717c(e) (since 1938); Federal Aviation Act, 49 U.S.C. § 1482(g) (since 1938). If petitioners prevail here, each of those statutes will presumably be affected, since all of them have their roots in the Mann-Elkins Act.

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[26] What we have said applies with equal force to the Government's faint suggestion (Gov't Br. p. 20) that petitioners here might also have invoked the jurisdiction of a three-judge court.

[27] 1 Sharfman, The Interstate Commerce Commission 202, discussing the Act as it existed after its 1920 amendment:

> "Upon failure of the Commission to issue an order within this prescribed [suspension] period, the proposed changes in rates were automatically to become effective, although the Commission might continue its investigation and bring it to decision."

C. ACCEPTANCE OF PETITIONERS' ARGUMENT WOULD NECESSITATE ATTRIBUTING AN IRRATIONAL PURPOSE TO CONGRESS.

Petitioners' argument as to the statutory language ultimately rests on the fact that in Section 15(7) Congress has stated only the affirmative of the proposition that the new rate "shall go into effect at the end of [the suspension] period," and did not in so many words go on to add something like "and the courts shall not extend the period of suspension herein provided." They apparently urge that because Congress eschewed this redundancy, Section 15(7) should be read as if it went on to say "unless further suspended by the courts." As we have shown, the current of the legislative history runs strongly against this novel mode of statutory construction, as does the contemporaneous construction of the Interstate Commerce Commission and the decision of this Court in the *Great Northern Railway* case that the power of suspension "was entrusted to the Commission only."

Moreover, upon petitioners' reading of the statute, Congress would have acted quite irrationally. It confided to an expert administrative agency a power that has been likened to the extraordinary remedy of the preliminary injunction. Exercise of that power requires an informed balancing by the expert agency of such factors as the general transportation significance of the rates in question, the novelty or difficulty of the legal problems they present and the potential injury to interests public and private that will be occasioned by the exercise or withholding of the power. So far as the expert agency is concerned, however, no matter how strongly the balance might weigh in favor of suspension, the power to suspend was limited to a maximum of seven months.

Thus Congress concededly decided that no matter how strong the showing by those complaining against a tariff, the public interest in carrier freedom to initiate and change rates, and the equity of having shared the burden of delay in the outcome of litigation before the Commission, required that the authority of its chosen agent, the Commission, be flatly limited to seven months. Yet, on petitioners' view, Congress would at the same time have decided that the courts—even though most of the factors to be weighed by the agency are not within their competence—should thereafter be free to extend that seven-month period indefinitely.[28]

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[28] The Government's position, although ostensibly narrower, has the same ultimate consequences. Thus although the likelihood of "virtual destruction of the complainant" is conceded by the Government not to enlarge the suspension authority of the Commission, which as a body expert in transportation patterns and economics is plainly far better qualified that any court to determine whether such a likelihood exists, it is nevertheless said to provide an occasion for the exercise of judicial authority.

The strongest affirmative showing, wholly lacking here, should be demanded before such a bizarre intent is attributed to Congress. A court would indeed be justified in straining the construction of the statute to avoid such a result; it emphatically would be unjustified in disregarding explicit statutory language in order to reach it.

A premise of this aspect of the argument of both petitioners and the Government is that absent Section 15(7) the courts would have an inherent plenary power to prevent irreparable injury by preserving the status quo pending the completion of Commission rate proceedings.[29] Both petitioners and the Government concede that even if any such power would otherwise exist it is to some degree confined by Section 15(7). Thus petitioners and the Government have both acknowledged that the courts may not suspend rates in the first instance, where the ICC has refused or has not been asked to do so, and the Government goes further to acknowledge that in other than what it calls the extraordinary case the courts may not supplement the Commission's suspension power.

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[29] Petitioners and the Government reach this conclusion by very different routes. The position of the former appears essentially to be that the courts had the power to restrain rates pending Commission decision prior to the passage of the Mann-Elkins Act, and that that power still survives at least in part. The Government, on the other hand, is of the view that prior to 1910 the courts may well not have had any such power with respect to carrier rates. (Gov't Br. p. 27) It urges that on this assumption the Mann-Elkins Act, in addition to authorizing the Commission to suspend carrier rates, should be read to make possible for the first time the intervention of courts of equity further to suspend them. In sum, although paying lip service to the proposition that the arrangement provided by the Mann-Elkins Act is one of "compromise" and "balance" (Gov't Br. pp. 11, 12), the Government in fact would go so far as to read the statute as an additional grant of authority to both Commission and court.

Assuming as do petitioners the existence of the general power postulated prior to the enactment of Section 15(7), therefore, the question would be not whether Congress has abridged that power, but how much it has done so. And assuming, as does the Government at least tentatively, the absence of such power prior to the passage of that statute, the question would be whether Congress in the Mann-Elkins Act made an affirmative grant of such a power, on a limited basis or otherwise. We submit that the terms of Section 15(7), whose plain meaning is altogether consistent with their history, demonstrate that if such a power ever existed with respect to carrier rates it has been altogether abrogated, and *a fortiori* that if such a power did *not* previously exist there was no thought of bringing it into being.

Beyond this, however, the assumption as to the existence of such a general equitable power in the area of Interstate Commerce Commission regulation is, entirely apart from the terms of Section 15(7), subject to the gravest doubt.[30] In *Board of R.R. Comm'rs* v.

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[30] Apart from two inapposite cases involving the Interstate Commerce Commission (see p. 63, *infra*), the decisions to which petitioners point for the proposition that there is inherent equity power to preserve the status quo pending administrative action all involve agencies exercising a regulatory authority far less pervasive than that of the Interstate Commerce Commission over rates. And it is noteworthy that in the case that both petitioners and the Government point to as the leading authority, West Indies Fruit & Steamship Co. v. Seatrain Lines, 170 F. 2d 775 (2d Cir. 1948), *cert. dismissed*, 336 U.S. 908, the court gave great weight to the fact that the injunction had been sought by the affected agency itself, in contrast to the present case where the ICC denies the authority of the courts to grant the relief asked by petitioners. Moreover, neither in that case nor in any of the others cited did the agency itself have a statutory power of suspension.

Great Northern Ry., supra, this Court not only stated its approval of the line of cases antedating the passage of what is now Section 15(7) that had held that there was no such judicial power as to carrier rate changes, but also went on squarely to hold that there was no power in the courts to issue an injunction "in aid of proceedings before the Interstate Commerce Commission" under another section of the statute. In that case a district court, upon allegation by certain railroads of irreparable injury, had enjoined a state order reducing intrastate rates until a determination could be made by the Commission under Section 13 of the Act as to whether the reduced intrastate rates would unjustly discriminate against interstate commerce. This Court reversed. To the contention that the injunction was in aid of the ICC proceeding—the Commission having no suspension power under Section 13—the Court responded that although by Section 13 Congress had made unlawful unjust discrimination through the fixing of intrastate rates it had entrusted "the appropriate enforcement of its prohibition primarily to the administrative agency." And, replying to the further contention "that the restraining power of the Court is needed to prevent irreparable injury," the Court said:

> "But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission." 281 U.S. at 430.

This is a clear recognition by this Court that the pervasive regulatory scheme embodied in the Interstate Commerce Act is intended to be complete in and of itself and does not admit of judicial intervention until its processes have been completed.

Finally, the views of the statute pressed by petitioners and the Government would make possible the very "confusion and discrimination" it was designed to supplant and remedy. Just as was true in 1910, there would certainly be many cases where the courts today would be unable satisfactorily to cope with the problems of obtaining jurisdiction over all parties to a tariff, of venue, of striking, with no intimate knowledge of the transportation industry, an equitable balance among the parties affected who resort to the courts and those who do not, of conflicting decisions where the same matter is litigated in different courts, and of fixing bonds adequate to protect the rate-making carrier in the event its rate is ultimately found to be lawful.

Particularly in a situation like the present one, involving a rate reduction, the "public interest" and "irreparable injury" are elusive concepts. Some are likely to be hurt if the rates of respondent are permitted to go into effect as provided by the statute, while others will undoubtedly be benefited. Under these circumstances it seems appropriate to leave the allocation of the burden and benefit where Congress so plainly placed it, to penalize for no longer a period those whom the rates will benefit, and who have already been denied that benefit for a substantial period, and to remit those who complain against the rates to the remedy that Congress has seen fit to give rather than permitting them to seek one that Congress has chosen to deny.[31]

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[31] It may be noted that the Government, although expressing the greatest concern over the situation where one potentially affected by the proposed rates of a carrier may suffer "extreme hardship" thereby, is apparently reconciled to the fact that a carrier who is exposed to a comparable degree of hardship by a Commission suspension of its proposed rates apparently has *no* remedy—adequate or inadequate—in the courts or elsewhere. See Consolidated Truck Service, Inc. v. United States, 193 F. Supp. 773 (D. N.J. 1960).

Such remission of complainants against the practices of railroads to the processes of the agency charged with regulating the carriers and denial to the complainants of anticipatory judicial relief is by no means unusual. It is a reflection of a public interest in having the uniformity and expertness of judgment that only the Commission can provide—a public interest that Congress elsewhere also has deemed significant enough to override private interests. Thus, Section 16 of the Clayton Act, 15 U.S.C. § 28, providing generally for injunctive relief for private parties claiming injury from violations of the antitrust laws, specifically excludes injunctions against a rail common carrier "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."[32] Construing this statute, this Court has said:

> "Its obvious purpose is to preclude any interference by injunction with any business or trans-

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[32] As noted above, in their complaint petitioners alleged that, in violation of § 2 of the Sherman Act, the defendants were attempting to monopolize and had conspired with one another in attempting to monopolize the grain transportation here involved by reducing their rates below cost so as to destroy barge line competition. (R. 9). In this Court petitioners have wholly abandoned that purported antitrust ground of jurisdiction and claim. They were compelled to do so not only because of the specific terms of § 16 of the Clayton Act but also because of these other considerations:

1. Any attempt to create a monopoly of the sort and by the means originally alleged by the petitioners would be self-defeating. See p. 58, *infra*.

2. There was demonstrably no conspiracy among the defendants. The defendants other than Southern, nominal respondents in this Court, merely filed defensive tariffs to meet Southern's rates and have no interest in sustaining them, as shown by their failure to participate actively in this case or in the proceeding before the Commission. See p. 4, *supra*.

actions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself . . . ." *Central Transfer Co.* v. *Terminal R.R. Ass'n*, 288 U.S. 469, 475.

Comparable considerations are present here.

II.

PETITIONERS' RELIANCE UPON "RELATED STATUTORY PROVISIONS" AS QUALIFYING THE UNEQUIVOCAL COMMAND OF SECTION 15(7) IS MISPLACED.

In an effort to give some semblance of color to their claim that Section 15(7) should not be read in accordance with its plain terms petitioners rely upon inferences purportedly to be drawn from "related statutory provisions." (Pet. Br. p. 23) None of the three statutory provisions to which they advert, however, relates at all to the proposition they advance or in any way supports a resolution in their favor of the single narrow question presented in this case.

A. THE NATIONAL TRANSPORTATION POLICY IS ALTOGETHER IRRELEVANT TO THE PROPER CONSTRUCTION OF THE PERTINENT TERMS OF SECTION 15(7).

Petitioners first point to the terms of the National Transportation Policy, 49 U.S.C., note preceding § 1, that in substance direct the Interstate Commerce Commission fairly and impartially to regulate all modes of transportation subject to the provisions of the Interstate Commerce Act. They urge that the legislative history of the National Transportation Policy discloses an apprehension on the part of some members of Congress that water carriers, which were placed under the jurisdiction of the Interstate Commerce Commission in the Transportation Act of 1940 of which the Policy was a part, would be so regulated by the Commission as to be prevented from competing effectively with the railroads, and suggest that the part of the Policy they invoke was specifically designed to set this apprension at rest.[33]

Even if this be conceded *arguendo* to be an accurate reading of the National Transportation Policy in light of its legislative history, its relationship to the present case is difficult to discern. Section 15(7) of the Interstate Commerce Act, the statutory provision at issue in this case, was, as we have pointed out above, first enacted in 1910 and last amended in any respect pertinent to the present problem in 1927.[34] It can hardly be seriously argued that a general statement of Congressional policy promulgated thirty years after the adoption of that statutory provision, and some thirteen years after its most recent amendment, sheds any significant light on the intent of the Congress in adopting and amending it. And even petitioners do not go so far as to urge that, if the issue in the present case would have properly been decided in favor of respondent prior to the promulgation of the National Transportation Policy, it should nevertheless be decided differently today because the Policy should in effect be read as amending Section 15(7). Since, therefore, the Policy cannot be read either as a reliable guide to the understanding of a specific Congressional determination made many years before or as a reversal of that determination, no argument based upon it has any proper place in this litigation.[35]

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[33] It may be noted that there cannot possibly be any complaint that this case involves a situation wherein the Commission is "so regulating water carriers as to prevent them from competing effectively" since the carriage by water of the bulk commodities covered by respondent's rates is for the most part specifically exempted from Commission regulation. See 49 U.S.C. § 903(b).

[34] The terms of § 15(7) were considered by Congress at the time it adopted the Transportation Act of 1940. The section was amended to place upon carriers the burden of proving the lawfulness of all proposed rate changes rather than merely rate increases, as to which they had borne the burden of proof since 1910. No other change was made in the section.

There is another reason why the terms of the National Transportation Policy are irrelevant in the present case. That policy, as petitioners themselves point out, is a directive to the Interstate Commerce Commission as to the basis upon which it shall exercise the jurisdiction and powers conferred upon it in the Interstate Commerce Act. Thus, while it may be said to impose on the Commission a "positive and active duty to administer each provision of the Act in such a way as to preserve the inherent advantages of each mode of transportation," *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411, 416 (N.D. Ala. 1959), *aff'd*

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[35] The Board of Investigation and Research was established by the Transportation Act of 1940, which also contains the National Transportation Policy. It is noteworthy that in its Report on Practices and Procedures of Governmental Control in 1944, four years after the adoption of the Policy, the Board made the following specific and unequivocal statement with respect to § 15(7) (H.R. Doc. No. 628, 78th Cong., 2d Sess. 185):

> "If the [investigation and suspension] proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, etc., becomes effective at the close of that period unless voluntarily further postponed by the carrier."

In light of the fact that the report refers to one circumstance under which a proposed rate does not become effective at the close of the suspension period, the omission of any suggestion that the proposed rate's effectiveness might also be delayed by order of court cannot be regarded as inadvertent.

per curiam, 361 U.S. 353, and to impose on courts reviewing Commission action the duty to judge such action by the same general standard, it cannot play a part in a case like this where there is no issue as to what the Commission should or should not do, but where, rather, it is common ground that the Commission has no duty or authority to act.[36]

B. THE RELIEF SOUGHT BY PETITIONERS IS NOT WITHIN THE SAVING CLAUSE OF SECTION 22 OF THE ACT.

Petitioners next argue that the saving clause of Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22, which preserves common law remedies not inconsistent with the statutory scheme, is "of relevance" in the construction of Section 15(7).[37] (Pet. Br. p. 25) This argument, an afterthought here advanced by petitioners for the first time, is without merit for several reasons.

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[36] In the assessment of general governmental policy toward the apparent position of the petitioners that they are entitled to rail rates high enough to insure that water carriers will be able to participate in particular traffic, consideration may appropriately be given to the amendment, in 1958, of § 15a(3) of the statute to provide that:

> "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this chapter and chapters 8, 12, 13 and 19 of this title." 49 U.S.C. § 15a(3).

See also the recent Presidential Transportation Message, H.R. Doc. No. 384, 87th Cong., 2d Sess. 4, where comment is made as to the inequity and undesirability of subjecting railroads to minimum rate regulation in the transportation of bulk commodities while at the same time exempting water carriers from such regulation.

[37] See too the Government's offhand "note also . . ." reference to Section 22. (Gov't Br. p. 22)

First, the argument completely begs the question presented by this case—whether Section 15(7) means what it says in providing that after the suspension period has expired rates filed by a carrier "shall go into effect." If it does, then even if a common law remedy could be said otherwise to have existed, any such remedy must be deemed to have been abrogated since it would by hypothesis be inconsistent with the statutory scheme. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426.[38] Petitioners, in asserting that the words of 15(7) must be disregarded if to give them effect would curtail a common law remedy that existed prior to passage of the Act, thus approach the problem from the wrong end. There is no reason for disregarding the specific provisions of the statute in order to accommodate a common law remedy. Rather, it is necessary first to look to the specific statutory provisions, for only thereafter can it be determined what common law remedies can survive under the general saving clause consistent with those provisions. See *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29. In this instance it is plain that the judicial remedy sought by petitioners, even had it existed at common law, would be flatly inconsistent with the express and unequivocal statutory command—that at the end of the suspension period, whether or not the Commission's investigation has been completed, the rates "shall go into effect."

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[38] See also Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., — U.S. —, construing the parallel provision in Part II of the statute (49 U.S.C. § 316(j)): "Survival [of a common law remedy] depends on the effect of the remedy upon the statutory scheme of regulation. According to § 216(j), if the remedy is inconsistent with that scheme it does not survive."

The Government refers to the *Hewitt-Robins* case in support of the proposition that it is always proper to construct a judicial remedy so long as that remedy is not contrary to the statutory scheme. (Gov't Br. p. 21). That case dealt, however, only with the survival of common law remedies, and as we shall show (pp. 57-62, *infra*), the remedy that petitioners here seek to invoke is not such a remedy.

Further, in view of the conceded consequences of provisions of Section 15(7) other than that here in question, there is no reason to start with any presumption that Congress in that section did not intend to establish a system of rights and duties complete and exclusive in and of itself, and departing significantly from the situation that would otherwise have existed under the common law. Thus, whereas prior to the passage of the Interstate Commerce Act the carrier was free to initiate its own rates, Section 15(7) drastically qualifies that preexisting right by lodging in the Commission a wholly discretionary power, whose exercise altogether deprives the carrier for up to seven months of its right to make its own rates, and without any possibility of redress should the rates suspended ultimately be found lawful. And whereas at common law the burden was on one protesting against a changed carrier rate to show it invalid, Section 15(7) requires the carrier, in the event of investigation of the rate, affirmatively to justify it. There is thus clearly no occasion for reading this section, which first came into being long after the adoption of the general language of Section 22 and which concededly drastically alters common law relationships in other vital respects to the detriment of the rate-making carrier, in contradiction of its plain terms in order to accommodate any fancied policy of preserving unaltered in this respect common law relationships.

In what we have just said we have assumed that to construe the statute as denying to petitioners the relief they here seek would be to withhold from them a remedy they would have had absent the statute—that the remedy that petitioners here seek to invoke is in fact one that existed at common law. This is not the case.

1. It is clear that the real thrust of petitioners' complaint against respondent's rates is that those rates are unreasonably low, and that they will accordingly prejudice water carrier competition, with direct ill effects upon petitioner Arrow and consequential ill effects upon the other petitioners. At common law, however, "unreasonably" low rates were not unlawful and hence gave rise to no cause of action on the part of anyone—shippers or their competitors, competitors of the carrier or municipalities. *Keogh* v. *Chicago & N.W.R. Co.*, 260 U.S. 156; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557.[39] Accordingly, no right of action based on this alleged illegality could be said to be preserved to petitioners by Section 22 of the statute.

Petitioners apparently recognize this difficulty, for they assert that respondent's rates are not merely unreasonably low but also "grossly discriminatory" and that the latter circumstance is in itself sufficient to support their suit.[40] There is, however, an insurmountable obstacle to this argument.

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[39] Petitioners' claim that respondent's rates have been deliberately set at noncompensatory levels in order to eliminate barge competition and achieve a transportation monopoly is in any event on its face implausible in light of the fact that such a course would be altogether self-defeating, since no monopoly thus achieved would benefit respondent financially. Thus § 4(2) of the Act provides that:

> "Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." 49 U.S.C. § 4(2).

Petitioners have conceded, as they must, that had the rates of respondent that they seek to enjoin not been suspended by the Interstate Commerce Commission they would have had no basis for seeking relief in the courts—that under these circumstances respondent's rates would have had to be allowed to become effective without judicial interference.[41] Their argument that the considerations that would bar relief under those circumstances do not operate here rests squarely on the contention that here the Commission has made a preliminary finding of "presumptive" illegality and has suspended the rates for the full statutory period, and that an injunction will therefore assist rather than derogate from the Commission's primary jurisdiction.[42] Even were this argument otherwise sound, its fatal flaw lies in the fact that on no view can it be said that the Commission in exercising its suspension power has made a preliminary finding that respondent's rates are presumptively illegal in any respect recognized as wrongful at common law. Section 15(7) requires the Commission to issue a statement of reasons as a condition precedent to the ordering of a suspension of rates, and such a statement was duly issued in this case. That statement will be searched in vain for any finding of, or indeed reference to, discrimination; the statement rather refers only to standards of legality that have no counterpart at common law.[43] Insofar as petitioners challenge respondent's rates as unlawful in any sense recognized by the common law, therefore—and Section 22 by its terms could not aid petitioners in a challenge based on any other standard of alleged illegality—there is no basis for any distinction between this case and one in which the Commission's suspension power has not been exercised.[44]

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[40] The asserted factual basis for this latter contention has been largely destroyed by events that took place during the course of the Commission hearing. See p. 8, *supra*.

[41] Thus in petitioners' Memorandum in Support of Motion for a Preliminary Injunction filed in the District Court petitioners expressly stated (p. 45): ". . . we agree that this court would have no jurisdiction to intervene if the I.C.C. had *refused* to suspend the rates." The Government is of the same view. (Gov't Br. p. 41).

[42] This argument must be assessed in light of the fact that the Commission's position as to judicial power in the premises is directly contrary to that asserted by petitioners and the Government in this case. (See Gov't Br. p. 1).

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[43] The Commission said, "there is reason to believe that [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .." (R. 7).

[44] Discrimination is a concept that is quite distinct from unjustness and unreasonableness and is by no means necessarily involved in unfair or destructive competitive practices. Section 2 of the Act, 49 U.S.C. § 2, defines and prohibits "unjust discrimination," the charging or collecting from one person of a greater or less amount than from other persons for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions." Another section of the Act, § 1(5), 49 U.S.C. § 1(5), lays upon railroads the duty of establishing rates that are "just and reasonable." In transportation law and public utility law generally these are words of art that mean rates that are neither uneconomically low nor exorbitantly high. "Unfair or destructive competitive practices," which are listed in the National Transportation Policy, note preceding 49 U.S.C. § 1, in a series that also separately includes "unjust discriminations," need involve no element of discrimination but rather comprehend such practices as establishing rates at less than the cost of providing the service to the detriment of competitors, as seems to be the thrust of petitioners' complaint against respondent's rates here.

2. Even were it to be assumed that prior to the passage of the Interstate Commerce Act persons in the position of petitioners could have invoked some form of equitable remedy with respect to rates such as those of respondent here, and that the terms and procedures of Section 15(7) did not in themselves supersede that remedy, it is apparent that the right of action which petitioners here assert is not one that existed at common law. In the first place, as pointed out above, petitioners recognize that an indispensable ingredient of their suit is the fact that the Commission has heretofore exercised its power of suspension with respect to the rates in question, and that had no suspension been ordered by the Commission they would have had no right to relief. By hypothesis no cause of action to which prior Commission suspension pursuant to statute is a condition precedent can be said to have been in existence at common law.

Furthermore, petitioners do not and cannot ask for a permanent injunction against respondent's rates, even if the Commission should find those rates to be unlawful. The grant of such relief is manifestly precluded by the statutory scheme whereby any order of the Commission with respect to the rates, whether approving or disapproving them, is subject to review only by a three-judge district court. Rather, the injunction petitioners seek would, unlike any injunction that could have issued at common law with respect to carrier rates, expire by its own terms at the time the Commission finally disposes of the rate proceeding before it and would at no time during its period of effectiveness rest on any determinative judicial, or indeed administrative, finding of illegality. Such a remedy plainly could have no existence apart from the Interstate Commerce Act and accordingly could not be deemed to be "preserved" by reason of Section 22.

C. THE STATUTORY PROVISIONS FOR JUDICIAL REVIEW OF COMMISSION ORDERS ARE OF NO ASSISTANCE TO PETITIONERS.

The third of the "related statutes" upon which petitioners rely, 28 U.S.C. §§ 2324, 2325, likewise is of no help to them. Petitioners assume without discussion that those provisions, which deal with the authority of three-judge district courts to review Interstate Commerce Commission orders, authorize such courts to enjoin carrier-initiated rates after the Commission has completed an investigation and issued an order approving, or refusing to disapprove, them.

Contrary to petitioners' assumption, there is nothing in the statutes to which they refer that supports the view that three-judge courts have such authority. Rather these statutes are directed to the authority of a three-judge court to grant interlocutory or permanent injunctions restraining the operation of Interstate Commerce Commission *orders*. It is elementary that under the Interstate Commerce Act the effectiveness of a carrier-initiated rate schedule does not depend upon a Commission order approving it, and accordingly any injunction against such an order would have the effect not of invalidating or suspending the rates, but only of cancelling any Commission approval of them and remitting the parties to appropriate further proceedings before the Commission.[45]

Further even if the statutes in question did not on their face exclude an exercise by three-judge courts of the kind of authority petitioners would ascribe to them, that fact would hardly provide a justification for ignoring the unequivocal terms of Section 15(7) in order to ascribe a like power to a single judge in the circumstances here presented. There is no principle of law which justifies the disregard of a plain statutory provision in order to prevent an alleged lack of symmetry between it and another statute, see *United States* v. *Shirey*, 359 U.S. 255, 262, particularly when that lack of symmetry would arise only if the second statute were to be given a reading which under no circumstances could be urged to be demanded by its terms but at the very most could be said only not to be foreclosed by them.[46]

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[45] The situation discussed in the text is to be distinguished from cases like The Chicago Junction Case, 264 U.S. 258, where the validity of the acts enjoined by the three-judge court depended upon the affirmative approval of a Commission order.

Finally, even if it were clear that Congress had vested in three-judge district courts the power to enjoin carrier rates pending review of Commission orders, that fact would by no means suggest that a single judge ought to be permitted to exercise the authority at issue in this case. For the very fact that such power was entrusted to a three-judge court rather than to the regular district courts would be a clear manifestation of the Congressional intention that matters of this kind, which do not relate merely to the propriety of past carrier acts but which control future transportation practices, are not to be dealt with by a single judge. See *United States* v. *Griffin,* 303 U.S. 226, 233.

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[46] In Pacific Inland Tariff Bureau v. United States, 129 F.Supp. 472 (D. Ore. 1955), and Cantlay & Tanzola, Inc. v. United States, 115 F.Supp. 72 (S.D. Cal. 1953), it appears that carrier rates were enjoined as incident to suits to enjoin Commission orders approving them or allowing them to go into effect. In neither case does it appear that the argument of a complete lack of power of the court to enjoin the rates pending review of the order was made at the time the original injunction issued. In *Pacific Inland* the argument seems never to have been made. When the basic question of power was raised in *Cantlay & Tanzola*, at the time of the decision on the merits annulling the Commission's order, the court found it unnecessary to decide since the carriers had voluntarily reinstated the previous rates. 115 F.Supp. at 83-85.

III.

PETITIONERS' ASSERTION THAT DENIAL OF THE RELIEF THEY SEEK WOULD RAISE CONSTITUTIONAL PROBLEMS IS WHOLLY WITHOUT MERIT.

Only a word need be said as to petitioners' contention that to read Section 15(7) as it is written would raise "grave constitutional difficulties." Cases like *Oklahoma Natural Gas Co.* v. *Russell,* 261 U.S. 290, upon which petitioners rely, are wholly inapposite here because the possibility of injury against which petitioners demand protection is one arising not from governmental regulation of their own rates or businesses but rather from the competition of respondent and the shippers respondent serves. The Constitution gives no guarantee of protection from competition. *Tennessee Elec. Power Co.* v. *TVA,* 306 U.S. 118. Compare *United States* v. *Illinois Central R. Co.,* 291 U.S. 457, 465 (concurring opinion): "At most it appears that the interest sought to be protected is a prospective share of future traffic which it is feared may be diverted to the Barge Line, an interest to which the Constitution plainly affords no protection."

Petitioners' argument is particularly unconvincing in light of the fact that should respondent's rates ultimately be held unlawful they would have available the provisions of Section 8 of the Interstate Commerce Act, 49 U.S.C. § 8, to which the Court of Appeals referred as giving an action for damages to persons injured by unlawful rate practices. Their situation thus stands in sharp contrast to that of respondent, and to the situation of the public which respondent serves. As a result of the suspension of respondent's new rates for the seven-month statutory period, respondent and the public have already been forever deprived of the benefits that would have flowed from those rates during that period, even should the rates be hereafter found, in the proceeding now pending for decision before the Commission, to be in full compliance with law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DEAN ACHESON
701 Union Trust Bldg.
Washington 5, D. C.

FRANCIS M. SHEA
734 15th Street, N.W.
Washington 5, D. C.

Attorneys for Respondent
Southern Railway Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, a corporation, JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, *Petitioners*

v.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIR LINE RAILROAD COMPANY, a corporation, *Respondents*

MOTION OF SOUTHERN GOVERNORS' CONFERENCE AND SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICI CURIAE

BRIEF OF STATE OF GEORGIA GEORGIA PUBLIC SERVICE COMMISSION SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS SOUTHERN GOVERNORS' CONFERENCE AS AMICI CURIAE

EUGENE COOK,
Attorney General for the State of Georgia

By PAUL RODGERS,
Asst. Attorney General

Of Counsel:
WALTER R. McDONALD

Due Date:
December 28, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION OF SOUTHERN GOVERNORS' CONFERENCE AND SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Come now Southern Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners and file this motion for leave to file jointly with the State of Georgia and Georgia Public Service Commission a brief amici curiae in this proceeding and state:

The Southern Governors' Conference is a 16 state organization composed of the ten southeastern states, three eastern border states and three southwestern states. In freight rate matters it has traditionally represented only the ten southeastern states. (In this proceeding it does not represent Alabama.)

The Southeastern Association of Railroad and Utilities Commissioners is an organization of the same southeastern states working with and implementing the policies of the Southern Governors' Conference with respect to transportation matters.

Both Southern Governors' Conference and Southeastern Association have appeared in the proceeding before the Interstate Commerce Commission and before the lower Courts in support of the respondent railroads.

These parties represent the broad public interest of producers, processors and consumers in the South and desire to file a brief directed toward that facet of the proceedng; it is felt neither petitioners nor respondents would adequately or properly represent the broad interests of the Southern Governors' Conference and the Southeastern Association.

Leave is therefore sought to file the attached brief. This motion dated at Atlanta, Ga., this twenty-seventh day of December, 1962.

Respectfully submitted,

SOUTHERN GOVERNORS CONFERENCE
SOUTHEASTERN ASSOCIATION OF
RAILROAD AND UTILITIES COMMISSIONERS

EUGENE COOK,
Attorney General for the State of Georgia

By PAUL RODGERS,
Assistant Attorney General
132 Judicial Bldg.
40 Capitol Square
Atlanta 3, Ga.

Of Counsel:
WALTER R. MCDONALD
Ga. Public Service Comm.
244 Washington St., S. W.
Atlanta 3, Ga.

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BRIEF OF STATE OF GEORGIA GEORGIA PUBLIC SERVICE COMMISSION SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS SOUTHERN GOVERNORS' CONFERENCE AS AMICI CURIAE

Interest of These Parties

The State of Georgia, Georgia Public Service Commission, Southeastern Association of Railroad and Utilities Commissioners and Southern Governors' Conference file this brief in order that the Court may be aware of the broad interest of producers, processors and consumers in the South as contrasted with the narrow interests of the competing carriers and the few large grain handling concerns (R. 39) who for the past few years have enjoyed an artificial advantage in the transportation and merchandising of grain because of the absence of a fair and reasonable level of railroad rates on grain moving to the South.

The parties to this brief have, for the past 25 years, actively endeavored, with a fair measure of success, to obtain reasonable freight rates from, to and within the South (R. 31). Their efforts have not been made in behalf of any specific segment of the South's economy, nor on behalf of any particular mode of transportation. These parties have, from time to time, supported the positions of both water carriers and railroads, governed always by what we consider to be in the best interests of the over-all public in the South.

The South has always been a deficit area for grain and in recent years, coincident with the development of a major livestock and poultry industry in the South, the consumption of grain has increased tremendously requiring importation from other territories of vastly increased quantities of grain (R. 18). For the past several years, these parties have worked diligently to secure relief for the people of the South from the inordinately high level of rates on grain.[1] The Southeastern Association is title plaintiff in a major complaint case, seeking lower rates on grain, which has been pending before the Interstate Commerce Commission since 1955.[2]

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[1] The present basic level of rail rates on grain to and within the South was approved by the Interstate Commerce Commission in Grain To, From, and Within Southern Territory. In a separate opinion, Commissioner Splawn said,

> "We are leaving all rates within the Southeast on an exceptionally high level, and that level will remain a controlling factor in making interterritorial rates to the Southeast. It is true that there was no widespread objection from the South against this unusually high rate level on grain. There was no one representing the general public, such as State officials, who appeared in protest to the general body of rates on this basic agricultural commodity." 259 ICC 629 at 789 (1945)

Unrealistically high railroad rates have diverted the preponderance of the grain movement to unregulated transport, mostly gypsy truckers (R. 19).

This unregulated movement of grain has decentralized the milling industry, disrupted historical grain marketing patterns, created uncertainty and bred inequities between various grain utilizing areas in the South.

The Southern Railway developed new methods for the transportation of grain including radically different equipment and new concepts of pricing (R. 15-18) which would be of great benefit to the vast majority of southern grain producers, processors and consumers and to the general public. When the rates were suspended by the Interstate Commerce Commission, these parties participated extensively in the proceeding before that Commission in support of Southern Railway.

The southern States support the suspended rates not only because they will provide needed and long overdue relief to the southern consumers of grain, but also because they will bring stability to the marketing of grain in the South and because they afford equitable treatment to people and places all over the South. The rates are made on basis of a scale providing rate parity to all locations and are not made on a point to point basis to meet or—as is alleged—to destroy water competition.

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[2] Docket 31874, Southeastern Association of Railroad and Utilities Commissioners, et al. v. Atchison, Topeko and Santa Fe Railway, *et al.*

Every day the effectiveness of these rates is delayed results in irreparable damage to thousands of southern producers and processors, and millions of southern consumers. (R. 31-32). If this Court should conclude these rates might further be enjoined, then further irreparable damage will be done to the general public in the southern States.

Argument

We think the lower court is correct in finding that the plain words of Section 15(7) of the Interstate Commerce Act that at the end of the suspension period prescribed by Congress, the rates ". . . shall go into effect . . ." without more preclude the issuance of an injunction by an equity court.

However, the holding of the court below is buttressed by numerous decisions of this court and by the practicably intolerable results which would flow from any other decision.

We shall discuss these briefly.

Under circumstances almost identical with the question here presented this Court has not found Equity Courts empowered to supply remedies withheld by Congress

Although Section 15(7) is, as the Court below says, "a model of clarity" and quite explicit in its terms, it may be contended the statute is incomplete in one respect and thus leaves an area in which equity courts might assert jurisdiction. Section 15(7) provides that rates may be suspended ". . . but not for a longer period than seven months . . ." and that if the Commission has not acted within the period of suspension, the proposed rate

> ". . . shall go into effect at the end of such period: but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified."

No remedy is found in Section 15(7) itself where there is a proposed reduced rate which might later be held unlawful. But this apparent gap is illusory; by Section 8 of the Interstate Commerce Act, Congress has provided in its legislative wisdom what the courts must accept as a proper remedy, and what is in fact that.

However, even in the absence of availability of such relief this court has tolerated an hiatus between the relief available under the motor carrier part of the Interstate Commerce Act and that available from the courts. In *T.I.M.E. Inc.* v. *U.S.*, 359 U.S. 464, the Court held that a shipper had no remedy either before the Commission or in the equity courts for exaction of an unreasonable rate on past truck shipments. Of particular significance were the remarks of the Court with respect to the circumstances obtaining after expiration of the seven months suspension period,

> ". . . Thus although under the statutory scheme it is possible that a shipper will for a time be

forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the I. C. C. has acted on the challenge, it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative 'lag' ". (359 U.S. at 480.)

There is no record of an Equity Court having ever granted injunctive relief at this stage of a suspension proceeding although there have been frequent opportunities to do so

Section 15(7) has been in the statutes in its present form since March 4, 1927 (47 Stat. 1447). No court of equity has ever interfered at this stage of any suspension proceeding.

There has been no lack of opportunity. More than half of all the rail suspension cases processed by the Interstate Commerce Commission are still pending when the statutory suspension period expires. Sometimes the carriers voluntarily further postpone the effective date, but many times they do not and the rates become effective.

We reiterate, the problems presented here arise frequently in the administrative process. The same situation pertains in more than half the suspension cases involving railroad rates and yet the petitioners cite only two cases in 35 years in which an equity court undertook to interfere with the administrative process. And even these cases—although we think they were decided erroneously—are clearly distinguishable from the circumstances here.

In *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955) the Interstate Commerce Commission hearings had been held, briefs had been filed, oral argument had been heard and the Commission had *acted*.

The injunction was issued to stay effectiveness of the rates *after* the Commission's decision, but before a formal petition for reconsideration had been filed. It would appear from a careful reading of the court's opinion that it is highly problematical whether the injunction would have been issued even at this stage except for the fact the Commission did not serve its order on the protesting parties in sufficient time to permit the filing of a petition for reconsideration before the effective date of the rates.

Furthermore, it must be recognized that this decision was rendered not by a Circuit Court of Appeals, but by a three-judge court and because the decision on this issue soon became moot, it was never reviewed by a higher court.

The circumstances in *Cantlay & Tanzola, Inc.* v. *U. S.*, 115 F. Supp. 72 (S.D. Cal. 1953) were similar to those in *Pacific Inland, supra.* Here again the Commission had made findings after investigation as to the lawfulness of the suspended rate and, except for reconsideration, the administrative process had been completed. Here again the question of the propriety of the injunction became moot and was not reviewed.

Injunctive relief at this stage of a suspension proceeding would create serious problems leading to the breakdown of the administrative process

Before this Court entertains any thoughts that equity courts may enjoin the effectiveness of rate changes beyond the seven months period provided by the statute, it should give grave consideration to the result not only in this case but in numerous similar proceedings which arise from day to day.

If an injunction is issued, how long does it continue in effect?

Obviously, if the injunction is to produce the results sought by the petitioners, there can be only two answers to this question, and neither is satisfactory.

First, the Court might maintain the injunction until the Commission decided the case, thus going directly in the face of the plain words of the statute and extend- the suspension period indefinitely.

And how long might this be?

Less than half the investigation and suspension cases involving railroad rates are processed to a conclusion by the Interstate Commerce Commission within the statutory suspension period. Many cases require far more than seven months to decide. Investigation and Suspension Docket 4208 involved rates on grain to and within the South, filed to become effective June 1, 1936. The decision was not handed down until February 1, 1945, although in the meantime interim rates were permitted to become effective (259 I.C.C. 629).

In Investigation and Suspension Docket 6867 reduced rates on tobacco from the South to the North, scheduled to become effectilve January 15, 1958, were held under suspension until the Commission's decision on January 11, 1960. *Tobacco from N. C. to Central Territory*, 309 I.C.C. 347.[3] Relieved of pressure the

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[3] See also, *e.g.*:

I & S 6981, *Coal from Kentucky, Virginia, and West Virginia to Virginia*. 308 I.C.C. 99; suspended July 28, 1958; decided July 13, 1959.

I & S 7552, *Soda Ash, Baton Rouge, Louisiana to Savannah, Georgia;* suspended March 11, 1961; still pending December 1, 1962.

I & S 7583, *Cement in Carloads 140,000 Pound Minimum Within SFA Territory;* suspended May 15, 1961; still pending December 1, 1962.

Commission might take even longer to make its decisions and thus deprive the public of the benefits of technological advances and lower cost transportation.

The other answer to the question is that the Court might simply decide the case on its merits and either dissolve the injunction or make it permanent; but this Court has over the years repeatedly, consistently and meticulously refrained from interfering with the administrative process until it has been completed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *cf. United States* v. *Illinois Cent. R. Co.*, 291 U.S. 457, 463; *Delaware & Hudson Co.* v. *United States*, 266 U.S. 438, 448-449.

Injunctive relief at this stage of a suspension proceeding can be viewed only as interference with the administrative process

The petitioners have undertaken to persuade the courts below that invasion of this area would be in furtherance of the administrative process. The opposite is true. All the petitioners want, either from the administrative process or elsewhere, is to prevent the respondents from making the rates effective. Under the administrative process they become effective at the end of the suspension period. Therefore any action the courts take is a direct interference with and usurpation of administrative action.

Inevitably the exercise of judicial power at this stage injects the courts into the rate regulation process prematurely. A court would not act solely on basis of the Commission's tentative findings in its *pro forma* suspension order and thereby shut the carrier off from presenting any disputed facts—facts which might already be of record in the uncompleted Commission proceeding. Unavoidably, therefore, the court would have to make its own findings as to the probable lawfulness of the suspended tariff and this can be viewed only as usurpation of the administrative function which this Court has consistently refused to condone.

In both the *T.I.M.E. case supra* and the recent decision in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 31, U.S. Law Week 4015 (decided Nov. 19, 1962) this Court recognized that such judicial interference jeopardizes the stability and equity of the rate structure.

Conclusion

The issue here is narrow. The question before the court is not whether an injunction *should* be issued, but whether one *might* be issued if it should be found warranted. Nevertheless, the record before this court and the pleadings of the petitioners deal with the merits of the injunctive relief requested and we therefore feel constrained to remark only briefly on this aspect.

Petitioners would have the court believe the circumstances in this case are like those in other struggles between barge lines and railroads which have been before this court in *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), aff'd per curiam, 361 U.S. 353 (1960); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D.Kan. 1961); *American Barge Line Co.* v. *Alabama G.S.R.Co.*, 306 I.C.C. 167, 174 (1959); and *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

This is not correct. In these cases dealing with the struggle between these two modes of transport there has always been involved one of these two propositions:

Either (1) railroads undertook to make a special low point-to-point rate departing from their normal basis of rates on the same commodity in the same territory solely for the purpose of capturing traffic from the barge line, or (2) the railroads refused to accord the barge lines as connecting carriers similar treatment to that accorded connecting railroads.

Neither of these conditions is here present.

The respondents are seeking to establish rates made on precisely the same basis whether the origin or the destination is a river port or an inland point far removed from the river. Under this proposal the railroads would treat our southern producers, processors and consumers equitably regardless of where they are located.

What the petitioners are trying to do is to deprive a consumer of grain at Orangeburg, South Carolina of a reduced rate on grain moving direct by railroad from Evansville, Indiana, so that they may force the movement over the longer and more expensive route using the river to Guntersville, Alabama, and unregulated trucking beyond (R. 36).

These parties respectfully submit that in the balancing of equities, the interest of the vast majority of the southern producers and processors and the interest of all the southern consumers of grain must be accorded the fullest weight. To issue the injunction here sought would not only deprive the general public in the South of rate relief to which it is entitled, but would create intolerable uncertainties in the marketing of grain and in the planning of grain processors and poultry and livestock producers.

Wherefore, the State of Georgia, Georgia Public Service Commission, Southeastern Association of Railroad & Utilities Commissioners and Southern Governors' Conference pray that this court affirm the decisions of the courts below.

Respectfully submitted,

Southern Governors Conference
Southeastern Association of Railroad and Utilities Commissioners
Eugene Cook,
Attorney General for the State of Georgia

By
Paul Rodgers,
Asst. Attorney General
132 Judicial Bldg.
40 Capitol Square
Atlanta 3, Ga.

Of Counsel:

Walter R. McDonald
Ga. Public Service Comm.
244 Washington St., S. W.
Atlanta 3, Ga.

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No. 430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ARROW TRANSPORTATION COMPANY, ET AL., *Petitioners*

v.

SOUTHERN RAILWAY COMPANY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS THAT SAID ASSOCIATION BE GRANTED LEAVE TO FILE A BRIEF AMICUS CURIAE HEREIN

BRIEF OF SAID ASSOCIATION PRESENTED WITH SAID MOTION

AUSTIN L. ROBERTS, JR.
R. EVERETTE KREEGER
Attorneys for said Association
5310 I.C.C. Building
P. O. Box 684
Washington 4, D. C.

December 28, 1962

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I

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the States of the United States.

By the Constitution of the NARUC its attorneys may be directed to appear on behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This motion and the brief presented herewith are offered on behalf of the NARUC by direction of its Executive Officers in the general public interest.

The instant case presents the question whether a Federal court may enjoin or suspend the effectiveness of proposed changes in railroad rates beyond the statutory period of suspension.

A number of state regulatory commissions are charged with the duty of representing the interest of their respective states in matters before the Interstate Commerce Commission. They are directly concerned with any judicial interpretation of the provisions of Section 15(7) of the Interstate Commerce Act.

In addition, many state regulatory statutes provide for a period of suspension for proposed rate changes in much the same regulatory scheme presented in the Interstate Commerce Act. The regulatory commission in such states are concerned with the outcome of the instant case, since the determination of the equities herein will undoubtedly influence any judicial interpretation of similar provisions of state statutes.

It is the position of the NARUC that the opinion below should be affirmed.

II

The instant case was brought to the attention of the officers of the NARUC by letter dated December 10, 1962, from one of its members. Decision as to NARUC activity regarding the case was made by the Executive Officers of the NARUC on December 17. It was therefore not feasible, with the intervening holidays and the necessary time for printing, to attempt to obtain consent of the parties to the filing of a brief amicus curiae on behalf of the NARUC in compliance with Rule 42 of the Revised Rules of this Honorable Court. It is not known whether such consent would or would not have been granted if time permitted a request to have been made. Under these circumstances, the indulgence of the Court is requested to permit the filing of this motion.

III

Because the regulatory commissions and boards represented in the membership of the NARUC are governmental bodies of the several States of the United States and have a vital interest in any judicial interpretation of Section 15(7) of the Interstate Commerce Act, and because the brief sought to be filed in their behalf is offered in the public interest of the peoples of said States, the NARUC respectfully represents that the filing of a brief, amicus curiae, tendered herewith in this case ought to be permitted.

In support of this motion, the NARUC cites as precedent the decision of this Court upon similar motion made on behalf of the state commissions in *State of New Jersey, et al.* v. *New York, Susquehanna and Western Railroad Company*, Dkt. No. 104, October Term, 1962.

IV

The NARUC, accordingly, presents herewith a copy of the brief which it desires to file, and respectfully moves that it be granted leave to file the same.

Respectfully submitted,

Austin L. Roberts, Jr.
R. Everette Kreeger
Attorneys for the NARUC
5310 I.C.C. Building
P. O. Box 684
Washington 4, D. C.

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

STATEMENT OF THE CASE

Southern Railway Company, et al., proposed certain reduced rates and charges on the transportation of grain in multiple-car lots from certain Ohio and Mississippi River ports to destinations in the southeast. These rates were suspended by the Interstate Commerce Commission under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), for the maximum suspension period until March 9, 1962. Southern

Railway voluntarily extended the effective date of the proposed rates to August 7, 1962, but declined further extension. The rates are still under investigation by the Interstate Commerce Commission.

Petitioners herein sought injunctive relief from the courts to restrain Southern Railway and the other railroads from putting the proposed rates into effect, pending decision by the Interstate Commerce Commission as to their lawfulness.

QUESTION PRESENTED

The question presented is whether the courts may enjoin a change in rates, until completion of an investigation by the Interstate Commerce Commission, beyond the expiration of the period of suspension provided for in the Interstate Commerce Act.

STATEMENT OF POSITION

It is the position of the NARUC that the courts may not enjoin a change in rates, pending ultimate Commission disposition, beyond the period of suspension fixed by statute. The NARUC takes no position regarding the level of rates under investigation.

The position of the Interstate Commerce Commission, as noted by the Solicitor General in the Brief for the United States as *amicus curiae*, deserves comment here. It is highly significant that the Commission disagrees with the position taken by the Solicitor General. For several years before § 15(7) was added to the Act, the Commission had, in its Annual Reports to Congress, asked for a suspension power over proposed rates.* The advice of the Commission was sought by the Congress when § 15(7) was first enacted, and subsequently when it was amended. And, the Commission is the agency charged with administering the Interstate Commerce Act as a whole, including § 15(7). Surely, therefore, the Commission is the institution best qualified to assess the purpose and proper construction of § 15(7), and the effect the contentions of petitioners, if successful, would have on its regulation of interstate commerce under the Act.

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* See, *e.g.*, I.C.C. Ann. Rep., 1907, pp. 9-10.

ARGUMENT

I. The Power to Suspend Proposed Rates is for a Limited Period Only and Is Vested Exclusively in the Interstate Commerce Commission

The Congress, in a statute aptly described by the Court of Appeals for the Fifth Circuit in its opinion in this case as "a model of clarity" (R. 121), has elected to vest the power to suspend proposed railroad rates in the Interstate Commerce Commission alone, and has limited the period of suspension the Commission may impose to seven months.

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), states that when a carrier files a tariff the Commission, either upon complaint or its own initiative, may initiate an investigation concerning the lawfulness of any rate, etc. contained in the tariff and, pending its hearing and decision, the Commission,

> ". . . upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect;

> and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; . . ."

How could Congress have expressed more clearly than in these imperative words the intention that a suspended rate "shall go into effect" at the end of the suspension period? A contrary construction would do violence to the language; and indeed there is no need for "construction" of a statute when its meaning is as plainly spelled out as is that of § 15(7), *supra.*

The decision of the court below, taking the statute at face value, and in so doing avoiding any conflict with the Interstate Commerce Commission's primary jurisdiction, was correct and should be affirmed by this Court. Were the statute far less clear, this result is compelled, if the Commission's primary jurisdiction is to be preserved and chaotic results of judicial interposing with the elaborate structure for regulating freight rates erected by Congress are to be avoided.

Even if petitioners had had a common-law right to the relief they seek, such a remedy could not have continued to co-exist with the carefully planned scheme of regulation Congress has provided, because it would be inconsistent with this scheme—with the effective exercise by the Commission of its primary jurisdiction over rate matters. See *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 473; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426.

As this Court said in *Board of R. R. Comm'rs.* v. *Great Northern Ry.*, 281 U.S. 412, 429:

> ". . . This power of suspension was entrusted to the Commission only."

In that case it was recognized that before the enactment of § 15(7) (in 1910 [cite])

> "the weight of decision was that such relief [injunctive relief against proposed railroad rates], although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission . . . ." (*Ibid.*)

The argument that such power in the courts was necessary to prevent irreparable injury did not there sway this Court, which noted that

> "in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission." (*Id.* at 430.)

To avoid duplication of the efforts of other parties, we will not go into the legislative history of § 15(7), and the background of the 1910 act which added original § 15(7) to the Interstate Commerce Act. These do, however, amply support our interpretation of the statute. But it is appropriate, we believe, for us to point out the contemporaneous construction accorded § 15(7) by the Commission just eight months after its enactment, in *Advances in Rates—Western Case*, 20 I.C.C. 307 (1911). This bears out the view of § 15(7) and the power of the courts taken by the court below in its opinion. The Commission without cavil said that the thrust of § 15(7), and its effect, was to supplant any equity jurisdiction the courts may have had to enjoin proposed railroad rates:

> ". . . Accordingly, for several years past the chief body of protest coming from shippers to this Commission has been against increases in rates, and the Commission being unable to stay these increases, the shippers sought from Congress the enactment of a law by which the power would be given to this Commission, when public reasons made advisable such a course, to lay a restraining hand upon the power and initiative which hitherto had rested with the carrier without limitation or constraint.
>
> "Moreover, the Federal courts found themselves embarrassed by the appeals made to their equity powers against such increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect, while as to others it was not in effect. With such a history before it Congress deemed it advisable to lodge with this Commission, which alone under the Abilene case, 204 U.S. 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can be had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.
>
> ". . . The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continu-

> ing instability of rates and consequent commercial disturbance . . . ." 20 I.C.C. at 313-314.

The clear words of the statute, this Court's statements in *Board of R. R. Comm'rs. v. Great Northern Ry. Co., supra,* the existence of the Commission's primary jurisdiction over rate matters, and the foregoing contemporaneous construction of the statute by the agency charged with its carrying out, not to mention the legislative history which we have not analyzed here, make altogether untenable the position of the petitioners in this case.

II. A Holding That the Courts Have Power to Enjoin Railroad Rates Pending Interstate Commerce Commission Decision as to Their Lawfulness Would Have a Chaotic Effect on the Regulation of Transportation

The ill effects of a decision by this Court upholding the contentions of petitioners are all too apparent. A disruption of the regulatory pattern would be inevitable, with resulting chaos, confusion, discrimination and other evils.

The members of the NARUC are charged with regulation in their respective states of intrastate transportation, so carried out as to protect the well-being of the public in general, shippers, and carriers. Anything acting adversely on the efficient and effective regulation of interstate transportation by the Interstate Commerce Commission must *a fortiori* affect adversely those who regulate on behalf of the several states, and make far more difficult their task of regulation. Further, and very important, a holding by this Court that the Federal courts have power to intervene in ratemaking proceedings prior to final decision by the regulatory agency, where there is a statute like § 15(7) providing for suspension power in the agency, would be an extremely unfortunate precedent with regard to the administration of the regulatory statutes of the several states, many of which have suspension provisions resembling § 15(7).* While the precedent would not necessarily be binding on state courts, it would be at least highly persuasive. Where followed, it would have much the same ill effects on the regulation of intrastate commerce as on that of interstate commerce. Examination of some of these ill effects is now in order.

A. Lack of Uniformity and Multiplicity of Actions

If the courts should undertake to suspend carrier-proposed rates, even though only for the period of time it takes the Commission to pass on the lawfulness of particular rate proposals, the rate structure would be likely to speedily deteriorate from a lack of uniformity. There would also be a strong likelihood of a multiplicity of actions. This is illustrated by the bringing of suits in district courts in Alabama and the District of Columbia in connection with these grain rates. It is all too likely that in any moderately widespread rate adjustment with a number of different parties concerned, injunction suits would be instituted in several district courts, on varying theories and with an unfortunate variation in result. This, of course, would represent yet another addition to the load on an already overburdened judiciary, as well as a chaotic force exerted upon the rate structure, intrastate as well as interstate.

Rates are often published by several carriers, to be effective in different jurisdictions. All the carriers will not necessarily be subject to service in all the jurisdictions. If, upon injunction suits being brought, judges in the different jurisdictions take differing views of the lawfulness of the proposed rates, as could well happen, the result will be that in some places (and over some railroads) the rates will take effect, in others they will not, while in still others, they may become effective in part only. The resulting lack of uniformity would lead directly to the evils envisioned in the leading case establishing the doctrine of primary jurisdiction, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-441. (And *cf. Baltimore & O. R. Co.* v. *United States ex rel Pitcairn Coal Co.*, 215 U.S. 481, 496.)

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* See, *e.g.*, ALA. CODE TIT. 48, § 54 (1958); ILL. REV. STAT. CH. 111 2/3, § 36 (1961); IND. STAT. ANN. § 55-114 (1951); KY. REV. STAT. § 276.170 (1955); N.C. G.S. § 62-125 (1960); and OHIO REV. CODE § 4909.27 (1958).

The lack of uniformity in rates resulting from a holding that the courts have jurisdiction to enjoin rates before determination of their lawfulness by the Commission would render largely nugatory the statutory letter and policy against undue preference and discrimination among shippers and places.

In *Abilene* the Supreme Court was speaking to the need for uniformly enforcing existing rates, rather than that for the uniform effectiveness of new rates; but judged in terms of either practical consequences or principle, refusal by the courts to accord primary jurisdiction to the Commission in deciding the lawfulness of existing rates, and the courts' misconstruing § 15(7) and undertaking to suspend (enjoin) new rates in advance of Commission decision as to their lawfulness, do not differ.

It is no answer to this problem to say that the Supreme Court would serve as the coordinating or unifying tribunal on rate matters. The time element involved in appeal to this Court would in many instances make this unfeasible; a case could easily become moot before the Court could act. Also, appeal to this Court could be expensive; the costs of a number of such appeals would be harmful to even the most prosperous shippers, carriers and other parties interested in rate matters, and could be disastrous for many. State commissions often intervene in Interstate Commerce Commission rate investigations; and litigation in several forums would be a heavy burden, in terms both of expense and demands on staff personnel.

B. Reduction in Effectiveness of Commission Regulation

If the courts invade what has generally been thought the Commission's exclusive province, the effectiveness of the Commission's regulation of rates must necessarily be diminished, even though the invasion is accomplished under the guise of "preserv[ing] the primary jurisdiction of the . . . Commission." (Pet. Br. 15) The Commission tries, in accord with statutory command, to administer the Interstate Commerce Act to provide for uniform regulation. If courts extend suspension of rates after expiration of the period prescribed in § 15(7), the task of the Commission is vastly increased in complexity. The courts, instead of reviewing Commission action, would be getting right into process of initial decision and regulation, helping the Commission stir the soup as it cooks.

* * * *

It is true that in this case the petitioners seek to have enjoined a rate which the Commission has suspended, and the argument is made that the court is acting in aid of the Commission's jurisdiction. But. the flaws in this contention aside, there is scant reason to believe that lower courts would consider themselves constrained by this circumstance to enjoin only those rates the Commission has previously suspended, should this Court overturn the decision of the court below. The likelihood is rather that whenever some district court feels a sufficiently appealing case of "irreparable injury" has been made, injunction will issue against proposed carrier rates based on allegations of counsel, and in hurried circumstances the antithesis of the studied decision complex rate matters demand.

Thus, contrary to the contentions of petitioners in their brief, the primary jurisdiction requirement is not just a "rule of convenience", and this is far from being "a situation where the reason for the rule does not exist . . ." (Pet. Br. 15)

CONCLUSION

Therefore, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

Austin L. Roberts, Jr.
R. Everette Kreeger
Attorneys for said Association
5310 I.C.C. Building
P. O. Box 684
Washington 4, D. C.

December 28, 1962